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SUPREME COURT, U.S.

NO. 74-6293

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

PHILIP J. GOLDBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

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OPINION BELOW

The Memorandum Opinion of the Court of Appeals, which was directed by the Court not to be published in the official reports, is attached hereto as Appendix A. An order of the Court of Appeals denying a petition for rehearing is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1974. A timely petition for rehearing was denied on February 6, 1975. However, because counsel for petitioner did not receive notice of the denial from the Ninth Circuit Clerk's office until February 21, 1975, he applied to this Court and, pursuant to order of Honorable William J. Brennan, Jr., Associate Justice of the Supreme

Court, on March 5, 1975, an Order Extending Time to File Petition for Writ of Certiorari was granted, providing that petitioner had until April 5, 1975, in which to file a petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether the Government in extracting a 17-count, complex indictment in a complicated mail fraud case against petitioner and four co-defendants within a one-hour period, thus limiting the grand jurors' consideration of the charges, the evidence, their deliberations, and their vote to a total of 42 seconds per count per defendant, denied petitioner's rights to accusation by a reasoned and informed grand jury required by the Fifth Amendment; and

2. Whether the totality of the prosecutor's conduct before the grand jury denied petitioner the Fifth Amendment right to due process where the prosecutor: extracted the indictment within a one-hour time period from the grand jury; refused to permit petitioner to appear before the grand jury when a subpoena duces tecum had been issued to petitioner directing his appearance; utilized hearsay testimony when better testimony was available; and had no reporter present in an effort to insure the prosecutor's manipulations were beyond judicial scrutiny; and

3. Whether petitioner, an indigent, was denied his Fifth Amendment right to due process and Sixth Amendment right to effective assistance of counsel where the trial court refused to require the Government to make available its jury book to petitioner, or in the alternative, to refrain from utilizing said book in the selection of the jury, where the trial court had stated it would not authorize

compensation for the efforts of counsel incurred in researching and assembling the voting records and idiosyncrasies of the panel; and

4. Whether petitioner was denied due process of law where the trial court, despite petitioner's request and over petitioner's objection, refused to instruct the jury concerning evidence of petitioner's good character which had been received during the trial; and

5. Whether petitioner was denied due process of law where the trial judge, in his charge to the jury, over petitioner's objection, instructed the jury it could consider evidence of uncharged misconduct against petitioner as proof of petitioner's guilt of the charges alleged in the indictment; and where the prosecutor argued certain uncharged misconduct to the jury in direct violation of the trial court's admonition that he not do so; and

6. Whether petitioner was denied due process of law where the Government, despite petitioner's repeated requests, failed to reveal the full details of a plea bargaining arrangement it had made with the key prosecution witness, and affirmatively misled the jury as to the true nature of said plea bargain arrangement; and

7. Whether the trial court's refusal to permit an attorney for petitioner to testify to the Government's threat to indict a key defense witness, and its further refusal to permit an attorney for petitioner to testify to a major Government witness's prior inconsistent statements, constitute denial of petitioner's Sixth Amendment right to have compulsory process for obtaining witnesses and to have the assistance of counsel for his defense and Fifth Amendment right to due process; and

8. Whether 18 U.S.C. § 3500, the Jencks Act, contains an "attorney's work product exception"; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time where the witness corrected same, which notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation" had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of Brady vs. Maryland.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition involves the following Constitutional provisions:

a. Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

b. Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

This Petition involves the following statute:

18 U.S.C. § 3500, Demands for production of statements and reports of witnesses.

The full text is set forth in Appendix C.

STATEMENT OF THE CASE

In October, 1970, a 17-count indictment was filed in the United States District Court, District of Arizona, Phoenix Division, charging petitioner Philip J. Goldberg and co-defendants, Edwin S. Newman, Emil Tucker, William Miles Skillman, and Robert Stanley Clark, with violations of 18 U.S.C. § 1341, the mail fraud statute. Petitioner was the only defendant whose case went to trial. Tucker, Skillman and Clark had all pleaded guilty to at least one count of the indictment. Tucker and Skillman were sentenced before and Clark was sentenced after petitioner's trial. Immediately prior to trial, the Government dismissed three of the 17 counts of the indictment, and severed co-defendant Newman's case from petitioner's. After his testimony at petitioner's trial, the indictment against Newman was dismissed. The trial against petitioner commenced May 22, 1973, before a jury, and on July 14, 1973, the jury found petitioner guilty on all 14 counts. (C.T. 78)*

On October 5, 1973, petitioner was sentenced to a term of two years imprisonment on each of the 14 counts of which he was convicted, the prison sentence to be served concurrently, and a fine of $1,000 on each of the counts. (C.T. 546)

The facts upon which the convictions were based are as follows:

In late 1967, petitioner was the president of Financial Security Life Insurance Company (hereinafter "FSL"), a privately held full reserve life insurance company chartered in Arizona and having in excess of $112 million worth of

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* "C.T." refers to Clerk's Transcript.

life insurance in force. (Ex. 1-C, p. 15)* In late 1967, petitioner and his co-defendant, Edwin S. Newman, implemented a concept whereby executives could exchange restricted assets, such as lettered stock, for a single premium annuity policy. The effective commencement pay-off date of the policy would coincide with the lifting of the investment restrictions on the stock so that the stock could be sold by the holder and in the intervening period the annuitant would have a fully paid policy to be used for various purposes, including collateral for loans. (M 80-82)

In the majority of instances, FSL took from the annuitant as payment for the annuity policies a premium note in the face amount of the policy. A premium note is legitimate payment for a policy under Arizona law. (B 223-224) The note, in turn, was usually guaranteed by a Colorado holding company, Financial General Capital Corporation (hereinafter "FGCC") in which petitioner owned a controlling interest. To induce FGCC to guarantee the premium note to FSL, the annuitant was usually required to transfer lettered stock in double the amount of the premium note. The conveyance of the stock to FGCC was coupled with an agreement whereby it could sell the stock after a stated period to fund its guarantee to FSL of the annuitant's premium note. Concurrently with the execution of the premium note, the annuitant was required to execute a "reservation of benefits and proceeds rider," which provided that, as between FSL and the annuitant, the value of the policy was reduced by the amount of the outstanding premium note.

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* "Ex." refers to Exhibits at the trial.

** The Reporter's Transcript, which is in 15 volumes, each volume having a separate letter designation, lettered as Volumes A through O, inclusive, is referred to by the letter designating the volume and the page number.

The annuitant would utilize the annuity policy to collateralize a new or existing loan from a lender. (K 326-336) (Ex. Q-16) When the lender would inquire of FSL as to the value of the annuity policy, FSL would inform the lender that the policy was fully paid, that there were no liens or encumbrances against the policy, and that the face value of the policy was the cash surrender value of the policy. Because FSL did not necessarily follow the same procedure with regard to the issuance of all the policies, variations evolved as time went on.

On April 18, 1969, after a New York bank seized the proceeds of its statutory deposit there, FSL was suspended by the Arizona Insurance Commissioner. (B 252-256) FSL was prohibited from conducting any further business. (B 256, L 391) After protracted litigation with the Insurance Commissioner of Arizona, during the summer of 1969, the company was ultimately placed into receivership. (L 388) (Ex. 3-NN)

A. <u>The Scheme Charged in the Indictment</u>

The indictment (C.T. 1-18) alleged that commencing January 20, 1968, through January 9, 1970, petitioner and his four co-defendants devised a scheme for obtaining money by false statements to lending sources that could be induced to loan money and to take as collateral to secure the repayment of such loans, single-premium annuities of FSL. That in execution of this scheme, petitioner and his co-defendants caused annuity policies to be used to borrow money from persons, banks and other lending sources, and that as to these persons "that made and considered making loans" to be collateralized with single-premium annuity policies issued by FSL, defendants caused the following false statements to be made:

(a) That the premiums were paid in full on the annuity policies - whereas, no payments except interest payments had been made on the promissory notes accepted by FSL.

(b) There were no liens or encumbrances of record against single-premium annuity policies offered as collateral - whereas, the reservation of benefits and proceeds riders reduced the policies to zero.

(c) That the face amount of the policy was the cash surrender value that would be paid to the annuitant after the due date specified in the policy - whereas, said policies were worthless.

That defendants withheld and concealed from the lenders the material facts that promissory notes had been accepted by FSL in payment of premiums, and that the policies were subject to riders providing that the policies would be reduced by the total amount unpaid.

That when these policies were issued by FSL "and accepted by lenders as collateral" and presented for payment, the lenders would be informed that no amounts were payable because no payments had been made on the promissory note.

The 14 count mailings of the indictment upon which petitioner was tried involved annuities issued to six individuals. Two of the co-defendants, Clark and Skillman, received annuities. Tucker arranged for the placement of some annuities. Newman was the vice president and a director of FSL and president of the holding company, FGCC.

Petitioner's defense was that the annuity concept was lawful and proper, that he relied upon his attorneys, including Newman, to insure the legitimacy of the program, and that his attorneys, including Newman, reviewed and drafted

the responses to the lenders. That FSL rather than acting in concert with Skillman as the indictment alleged, had in fact been defrauded by Skillman, who had perverted the annuity concept for Skillman's own financial gain, and in the process bilked FSL out of over a million dollars.

REASONS FOR GRANTING THE WRIT

I. THE GOVERNMENT'S EXTRACTION FROM THE GRAND JURY OF A COMPLEX 17 COUNT INDICTMENT AGAINST FIVE DEFENDANTS IN THE TOTAL ELAPSED TIME OF ONE HOUR, THUS LIMITING THE GRAND JURORS' CONSIDERATION OF THE CHARGES, THE EVIDENCE, THEIR DELIBERATIONS AND VOTING TO 42 SECONDS PER COUNT PER DEFENDANT, DENIED PETITIONER'S FIFTH AMENDMENT RIGHT TO INDICTMENT BY AN INFORMED GRAND JURY.

This Court very recently reiterated a long-standing principle of American jurisprudence:

> "The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime 'unless on a presentment or indictment of a Grand Jury.' This constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' Stirone v. United States, 361 U.S. 212, 218 . . . whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." U.S. v. Dionisio, 410 U.S. 1, 16-17 (1973).

The Government, through an Assistant United States Attorney and an attorney from the Department of Justice, extracted this complex 17-count indictment against petitioner and his four co-defendants in a single one-hour session on October 14, 1970. (A 72-76) This necessarily implies* that in that one hour the grand jurors: (i) were informed of the allegations of the indictment, (ii) heard and considered the

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* Because the Assistant U.S. Attorney "didn't want a reporter present," there is no reporter's transcript of what occurred in this one-hour period. (A 76)

evidence, (iii) deliberated and voted to return a true bill.*

This case was not a garden-variety criminal case. At the trial, the Government during its case in chief (which spanned 22 days) called 35 witnesses.

The indictment alleged that five named defendants each acted in concert with the others and various persons in execution of the scheme alleged. Seventeen different lenders were stated to be involved. (Count 1) Out of the 17 count mailings, no two of these mailings were identical, either in format or in content. No two transactions which were the subjects of the events from which the mailings alleged in the indictment emanated were identical. In some instances FSL was seeking to obtain back policies it had issued; in others it was responding to inquiries from lenders or attempting to gain information from annuitants as to the whereabouts of policies; in other instances it was acknowledging the recordation of assignments, etc. Six of the letters were addressed to FSL from various individuals or organizations (Counts 3, 10, 11, 15, 16, 17); two were addressed to a co-defendant, Skillman (Counts 7 and 12); five were addressed to various lenders (Counts 1, 5, 6, 9, 14); one was addressed to petitioner (Count 2); one to an annuitant, Stacey (Count 8); and one to a third party who was neither an annuitant nor a lender (Count 8).

The trial judge at the commencement of the trial observed that the case was "complicated" (A 200) and he required 27 minutes just to read fourteen counts of the in-

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* Grand juries are charged at the time they are empaneled that their "prime function is to decide whether or not sufficient evidence has been produced to indicate that a crime has probably been committed by the person accused." See Charge of Judge Irving Kaufman, 17 F.R.D. 331, 335; Charge of Judge Leon Yankwich, 19 F.R.D. 117, 121.

dictment to the petit jury. (A 202-218) The prosecutor's opening statement to the petit jury was prefaced with the observation, "We are faced with an extremely complex case . . ." Following that observation it took the prosecutor 1-1/2 hours to explain the nature of the charges in his opening statement to the petit jury. (A 279)

Petitioner is not suggesting that there is or should be some legal rule of thumb by which the length of the grand jury proceedings has to be proportionate to the length of the trial. Rather, he notes these facts only to demonstrate that the case was "complex" (the prosecutor's observation), that it was "complicated" (the trial judge's observation), and that it was impossible for the grand jury to give any meaningful consideration to the probable cause finding required for indictment by a grand jury, as the Constitution requires.

Except for the sagest of judges, it is an impossibility to read and understand this indictment in one hour, let alone consider any evidence against five defendants.

At least since the time of Blackstone the proper performance of the grand jurors' function required that the jurors:

> "be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied to very oppressive purposes." 4 Blackstone 303.*

This principle has continued to be a requirement for the proper operations of grand jurors in this country. Ex Parte Bain, 121 U.S. 1, 11 (1886), quoting Grand Jury Charge of Justice Field that:

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* As quoted in Beavers v. Henkel, 194 U.S. 73, 84 (1904).

> "No person shall be required . . . to answer for any of the higher crimes unless this [grand jury] body . . . shall declare upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." (Emphasis added)

The grand jury is supposed to function as the primary security of the citizenry against hasty prosecutions and thus is charged with the duty "to determine whether a charge is founded upon reason or is dictated by an intimidating power or by malice and personal illwill." Woods v. Georgia, 370 U.S. 375, 390 (1962). It cannot begin to implement its constitutional duty in a case where the prosecutor is able to ramrod a complex indictment through it in a one-hour interval.

As observed in Branzburg v. Hayes, 408 U.S. 665, 701-702 (1972):

> "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made . . . ."

However, when the total elapsed time of the grand jury's consideration of the charges, hearing of the evidence, deliberations and voting can all be caused to occur within a one-hour period, thus allotting a total elapsed time of 42 seconds consideration per defendant per count, there is no way it can be seriously contended that the grand jury "examined" -- let alone understood and carefully deliberated upon the charges of the indictment.

A prosecutor's extraction of an indictment in a case like this constitutes ipso facto a perversion of the grand jury system and a denial of petitioner's right to indictment by a reasoned and informed grand jury as required by the Fifth Amendment. The statements noted supra from Ex Parte Bain, supra; Woods, supra; Branzburg, supra; and

Dionisio, supra are meaningless when a prosecutor who in fact controls the evidence that comes before a grand jury can accomplish what was done here.

This Court has long held that the abuses of the grand jury system occurring through a prosecutor's unilateral dealings with that body would be remedied, stating:

> "Were such abuses called to the attention of this Court, it would doubtless be alert to repress them." Hale v. Henkel, 201 U.S. 43, 65 (1906)

The Court stated in 1973 that "the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression." Dionisio, supra, at 401 U.S., p. 12. That is precisely what occurred in this case -- through the unilateral dealings of the prosecutor with the grand jury. The conduct of the Government in this case is truly no less "shocking to the conscience" than the stomach pumping of Rochin (People v. Rochin, 342 U.S. 165, 169 (1952)), or the illegal month-long bugging of the defendant's bedroom in Irvine v. California, 347 U.S. 128 (1954).

Because petitioner was denied his right to be indicted by a grand jury which had the duty but not the opportunity to fairly consider the charges and the evidence, petitioner was denied a fundamental right at the very commencement of the criminal process. This Court should issue the writ so that it can put an end to these pernicious activities of prosecutors before Federal Grand Juries.

II. THE TOTALITY OF THE PROSECUTOR'S CONDUCT WITH THE GRAND JURY DENIED PETITIONER A FURTHER FIFTH AMENDMENT RIGHT -- THE RIGHT TO DUE PROCESS.

The deprivation suffered by petitioner did not end with merely the prosecutor's glib one-hour presentation of

this complex case and the denial to the grand jury of any meaningful opportunity to consider the nature of the charges, the evidence and the propriety of the indictment. Rather, it was accomplished by the following, which exacerbated the denial of petitioner's fundamental right to indictment by a grand jury and resulted also in a denial of petitioner's right to due process.

(1) Petitioner had been subpoenaed to appear before the grand jury at its October 14, 1970, session. The subpoena required him to appear and produce records relating to FSL. He duly appeared with the records on October 14. However, before appearing before the grand jury he was intercepted by the prosecutor who informed him he could not appear before the grand jury and instructed petitioner that he must turn over the records to the prosecutor.* (A 77-78) Petitioner requested the opportunity to testify, but the prosecutor refused.

(2) The Government's evidence before the grand jury consisted solely of two witnesses, neither of whom was percipient to the transaction or events. One was a postal inspector who testified that he was before the grand jury "about 30 to 45 minutes maybe." (A 69) The other, Trexler,** testified approximately 15 minutes. (A 79)

(3) No reporter's transcript of these witnesses' testimony or the prosecutor's comments to the grand jury was kept, because there was no reporter present since the prosecutor "didn't want one there." (A 76) So, there is no

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* In addition to the prosecutor cancelling the subpoena to petitioner, he cancelled the subpoenas of other persons percipient to the activities giving rise to the allegations in the indictment.

** Trexler's trial testimony was solely concerned with the custody of certain records of FSL which he acquired pursuant to his designation as the receiver for FSL. (B 124-129)

record of what was said in their brief interval of testimony -- which lasted between 45 minutes and one hour "maybe."

Petitioner concedes that an accused has no absolute right to be called as a witness before the grand jury; however, by denying petitioner the right to testify, as was petitioner's duty pursuant to the grand jury subpoena in this case, the prosecutor was thus able to seal off any other evidence or explanation thereof favorable to petitioner, thereby insuring that the gossamer position of the Government before the grand jury was not disturbed. This was plainly wrong, as this Court has continually recognized the primary and nearly exclusive role of the grand jury as an agent of compulsory disclosure. Branzburg v. Hayes, 408 U.S. 665, 668 (1972). This Court has not recognized the United States Attorney's Office as a proper substitute for the grand jury room. The grand jury subpoena is a process of the district court, not a compulsory administrative process of the United States Attorney's Office as used by the Government in this case. Cf., Durbin v. U.S., 221 F.2d 520, 522 (D.C. Cir. 1954).

Petitioner acknowledges that under the authority of Costello v. U.S., 350 U.S. 359 (1956), hearsay evidence is admissible before a grand jury, and its use has been sanctioned in subsequent cases. Even so, the Second Circuit has invoked its supervisory powers and held that the prosecutor has an affirmative duty to tell the grand jury that it is listening to hearsay. See U.S. v. Estepa, 471 F.2d 1132 (2nd Cir. 1972), and collection of cases therein. Here there is nothing to indicate that the admonition that is required in the Second Circuit was in fact given to the grand jurors. Petitioner submits that the utilization of non-percipient witnesses should not properly be a

basis upon which indictments are rendered when percipient witnesses are readily available. That position is advanced by the American Bar Association. See ABA Standards Relating to the Administration of Criminal Justice, Sections 3.5 and 3.6, p. 90 (1974). Even if this Court declines to modify Costello or, in its supervisorial powers, require a warning similar to that of the Second Circuit, still the utilization of such witnesses cannot be condoned in this case since, when it is added to the other machinations of the prosecutor, the totality of circumstances requires reversal of petitioner's conviction.

Petitioner acknowledges that at the time the grand jury heard that testimony of the two witnesses, viz.: on October 7, 1970, he did not have an absolute right to a transcript absent a previous request and offer to pay the expenses of a reporter. U.S. v. Thoresen, 428 F.2d 654 (9th Cir. 1970). However, this concession does not operate to mitigate the Government's conduct in manipulating the grand jury in the instant case.

By refusing to have a reporter present to record the testimony because the prosecutor "didn't want one" the Government was able to mask the charade of de minimus evidence presented to the grand jury from discovery by anyone for all time.

In U.S. v. Cramer, 447 F.2d 210, 214 (2nd Cir. 1971), when faced with an issue where appellants there contended that failure to record grand jury testimony constituted a denial of due process, the court, per Judge Friendly, in denying the validity of this contention, stated:

> "While appellants raise the spectre of arbitrary and discriminatory prosecutorial conduct in selecting those cases in which grand jury testimony will be recorded, it will be time enough to deal with such a problem when, as, and

> if a defendant comes forth with any evidence suggesting bad faith on the part of the government--something appellants have utterly failed to do here."

Judge Oakes, in his dissenting opinion in that case, found the Government's failure to record a violation of Rule 6(d), F.R.Cr.P., "if not the due process clause of the Fifth Amendment. . ." (Id., at 221)

Recordation is recognized as the preferred method of dealing with witnesses' testimony before the grand jury, as it assists "in controlling overreaching or improper examination of witnesses by the prosecutor." 8 Moore's Federal Practice, Criminal Rules ¶ 6.02[2]. See U.S. v. Gramolini, 301 F.Supp 39, 42 (D.C.R.I. 1969).

The Government's dealings with the grand jury in these matters clearly deprived petitioner not only of his Fifth Amendment right to due process, but even a colorable parataxis implicit in the concept of ordered liberty. There is more here than a "spectre of arbitrary and discriminatory prosecutorial misconduct." There is actual misconduct and perversion when the actions of the prosecutor are juxtaposed with the total elapsed time of one hour for the grand jury's total consideration of this case.

The trial court at a pretrial hearing, while acknowledging that petitioner's arguments re perversion were meritorious, indicated that it did not have the authority to grant petitioner the relief requested, viz.: dismissal of the indictment. (A 89-90)

The Panel appeared to acknowledge the errors cited by petitioner in these arguments, but cited U.S. v. Costello, supra, as controlling in holding that the prosecutor's perversion was not "clear, prejudicial error." (Memorandum, page 7) An attempt to extend Costello to these lengths is

plainly wrong, as Costello holds only that an indictment is valid, although based entirely on hearsay. (Id., at 362.) Petitioner's research disclosed that Costello has been cited in at least 17 Supreme Court opinions, 195 Circuit Court opinions, and 137 District Court opinions. In not one of those opinions was there ever a hint that Costello would be authority to countenance the type of perversion which petitioner has demonstrated in this case.

This case is a shocking example of prosecutorial manipulation and perversion of the grand jury and the concomitant deprivation of petitioner's Fifth Amendment rights. The writ should be granted to clarify the extent of an accused's rights before the grand jury, since appellate courts refuse to recognize that in the twentieth century something other than fifteenth century notions of due process are required.

III. THE TRIAL COURT DENIED PETITIONER, AN INDIGENT, HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHEN IT REFUSED TO REQUIRE THE GOVERNMENT TO MAKE ITS JURY BOOK AVAILABLE TO PETITIONER OR, IN THE ALTERNATIVE, REFRAIN FROM USING IT.

At a pretrial conference petitioner inquired of the Government "whether or not they intend to utilize a jury book in connection with the jury selection process . . ." (A 185)

A jury book is a compilation prepared by the U.S. Attorney's Office on the voting record and idiosyncracies of individual jurors on the panel. (A 185-186) The prosecutor indicated the Government's possession of such a book and its intention to use it. (A 186) Petitioner then moved that either the Government be prohibited from using the jury book in connection with the jury selection process

or, in the alternative, that it be made available to petitioner's counsel. (A 187) Petitioner was indigent and his counsel had been appointed under the Criminal Justice Act. The court indicated that it would not authorize compensation for the efforts incurred in researching and assembling the voting records and idiosyncrasies of the panel to prepare a comparable book by petitioner. (A 187) The court denied petitioner's request and the Government did use its jury book in the selection of the jury. (A 189)

There is no question but that petitioner was at a distinct disadvantage when the trial court refused to require the Government to make available its jury book to petitioner or, in the alternative, not to utilize it, since:

(1) Petitioner was an indigent and a nonresident of the district and state wherein the trial was held; and

(2) Petitioner's counsel was neither a resident of nor maintained an office in the district or even in the state where the trial was held, and was appearing pro hoc vice. Further, there was no correspondent local counsel to assist trial counsel because of petitioner's indigency; and petitioner was entirely without any useful information on the prospective jurors; and

(3) The voir dire conducted by the trial judge to the entire panel at one time, under the Arizona system*--

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* Under the "Arizona system" of jury selection, the entire panel of jurors (37 in this case) was called, sworn and interrogated at one time by the judge. After challenges for cause were exercised by each side, Government and defense counsel were then required to separately state in writing their peremptory challenges and jointly submit them to the clerk, so that the first 12 individuals who were not challenged by either petitioner or the Government were then called by the court and became the jurors in the case. Under this system, at the time of exercising the challenge, neither counsel has any idea what jurors the other side has peremptorily challenged since it is stated in a separate writing by each side, which is then handed to the clerk who makes the tabulation. Petitioner's objection to this procedure was overruled. (A 190)

a procedure requiring petitioner to exercise his peremptory challenges concurrently with those of the prosecutor, and thus in effect in the dark--rendered useless the peremptories allowed petitioner.

The value of petitioner's access to a jury book, which gives at least the voting records and proclivities of the individual jurors, cannot be denied. This is particularly true when the procedure for voir dire--the Arizona system--involved the en banc questioning of the entire panel of jurors at one time. Envisage the scene from petitioner's vantage point: The 37 members of the panel, some seated in the jury box and some seated in the spectators' section, all being read voir dire questions and assertedly ready to orally respond sua sponte to a question if it pertained to him or her. Neither petitioner nor his counsel had any meaningful opportunity even to observe the impact of the questions on each of the individual jurors.

Under these circumstances, the denial of petitioner's access to the jury book is particularly acute when neither he nor his counsel is "local" to the community and where petitioner did not have the financial wherewithal to institute an inquiry into the background of the jurors. Thus, because of his indigency the petitioner's peremptories were rendered a nullity when contrasted with the Government.

This Court has observed that the right of a defendant to peremptory challenges:

> "is 'one of the most important rights secured to the accused.' . . . The denial or impairment of the right is reversible error without a showing of prejudice." Swain v. Alabama, 380 U.S. 202, 219 (1965). (Emphasis added)

In Swain, Mr. Justice White, after a review of some of the reasons that may prompt a party to exercise his peremptory challenges, concluded:

> "Hence, veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them . . ." 380 U.S. at 221.

Since Griffin v. Illinois, 351 U.S. 12, 17-18 (1956), the concepts of due process and equal protection require that if a defendant be indigent, the Government has an obligation to prevent discrimination and wealth from working an inequality in the criminal process.*

Equal protection of the laws requires that the mere fact of indigency should not place a defendant at a disadvantage, Roberts v. LaVallee, 389 U.S. 40, 42 (1967). Indigents have the same right of access to the courts as do any other defendants. That right to a fair trial "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." Gilmore v. Lynch, 319 F.Supp. 105, 110 (1970), aff'd. sub nom., Younger v. Gilmore, 404 U.S. 15 (1971).

While petitioner was required to exercise his challenges by total guesswork predicated on the vague and inadequate knowledge of the jurors he was able to obtain from the manner of voir dire conducted by the court, the Government was able to rely and did rely on the information contained in its jury book. By denying petitioner access

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* While the Government may not be required to relieve an accused of his poverty, it may properly be required to minimize the effect of an accused's poverty on the Government's administration of justice.

> "A problem of poverty arises before the system of criminal justice when at any stage in the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or a claim of right." Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, pp. 5-11 (1963).

to the Government's jury book or, in the alternative, prohibiting the Government from using that book, the court prohibited petitioner from standing on an equal footing with the Government in intelligently exercising his challenges to any juror. This imbalance resulted from petitioner's indigency, since the trial court would not have authorized payment of the necessary expenses by petitioner in an effort to compile a similar book.*

The Sixth Amendment right to counsel includes the right to effective assistance of counsel. Certainly, if counsel for an indigent defendant cannot stand on equal footing with the Government prosecutor in the knowledge of the venireman's proclivities, propensities and voting records, this concept is violated particularly when indigent's counsel could be put on a par with the Government by permitting access to the book or simply denying the prosecutor the right to use that book. It matters not whether the right in this instance be labelled as concomitant to the due process clause of the Fifth Amendment or as falling within that portion of the Sixth Amendment guaranteeing the right of the defendant to the effective assistance of counsel, or both. What matters is that "there can be no equal justice when the kind of trial a man gets depends on the amount of money he has." Griffin, supra, 351 U.S. at p. 19.

The Panel below in upholding the trial court's ruling found no "prejudicial error" and cited to Hamer v.

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* Counsel for petitioner was appointed pursuant to the Criminal Justice Act, 18 USC § 3006A, et seq. The United States pays the expenses of an indigent's defense in a criminal case, but it is up to the trial judge to determine which expenses are properly reimbursable and the Chief Judge of the Circuit to approve that determination. 18 USC § 3006A(b)(3).

U.S., 259 F.2d 274 (9th Cir. 1958) [p. 8 of Memorandum]. A citation to that case is erroneous, since Hamer expressly held that if the Government used a jury book, then:

> " . . . it is up to the individual judge to see that neither attorney has an unfair advantage over the other, whether by use of jury lists or jury books, or any other knowledge or information that exists with respect to a juror's previous action." 259 F.2d at 281.

Here the trial court violated the holding of Hamer when it permitted the Government to utilize the jury book and thus affirmatively permitted the Government an unfair advantage over petitioner. Petitioner submits that his conviction must be reversed.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE TRIAL COURT, DESPITE PETITIONER'S TIMELY REQUEST, REFUSED TO INSTRUCT THE JURY CONCERNING EVIDENCE OF PETITIONER'S GOOD CHARACTER WHICH HAD BEEN RECEIVED DURING THE TRIAL.

At the trial, affirmative evidence as to petitioner's good character was elicited through the testimony of witness Maryalice Darling.* She testified as to petitioner's excellent business reputation and general reputation for honesty and integrity. (B 199-201)

Prior to the trial court's instructions to the jury, petitioner, at the instruction conference, submitted proposed jury instructions concerning this character evidence, but the trial court refused to give any character evidence instruction whatsoever in the apparent mistaken belief that no reputation or character evidence had been received during the trial. A copy of the proposed instruction

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* Mrs. Darling was called as a Government witness, and the favorable character testimony was elicited by way of cross-examination, with the trial court's permission, in order to avoid calling her later during petitioner's case in chief. (B 198-199)

is attached hereto as Appendix D. Petitioner's counsel attempted to convince the trial court that there had in fact been character evidence received during the trial, but to no avail. (O 84-86, 111, 113-114) No good character instruction of any sort was given by the trial court in its charge to the jury.

The relevance of a criminal defendant's character in resolving probabilities of guilt, and his right to introduce such evidence, together with appropriate instructions to the jury have long been recognized by this Court. Edgington v. U.S., 164 U.S. 361 (1896); Michelson v. U.S., 335 U.S. 469, 476 (1948).

In the instant case, petitioner was deprived of his right to have the jury instructed that it could consider the evidence of petitioner's good character as raising a reasonable doubt of his guilt of the charges against him. "It is reversible error not to instruct as to defendant's theory of the case if the record contains evidentiary support for the theory and the theory is supported by law." U.S. v. Noah, 475 F.2d 688, 697 (9th Cir. 1973).

The Memorandum Decision of the Court of Appeals below is totally silent as to this fundamental error committed by the trial judge, despite the fact that this issue was fully briefed and presented to the Panel for its determination. This is particularly inexplicable when the Ninth Circuit has held that "evidence of good character may be sufficient alone to create a reasonable doubt of guilt . . ." and that the jury must be so instructed. Weedin v. U.S., 380 F.2d 657, 660 (9th Cir. 1967).

We submit that the question of petitioner's criminal intent was the key issue at the time of trial. Had the jury been instructed as to the weight it could give to

the good character testimony that had been received in evidence, it might well have tipped the scales in petitioner's favor. The failure of the trial court to give the jury a proper character evidence instruction, despite the clear evidentiary support therefor, deprived petitioner of a fundamental right accorded him by due process of law, and petitioner's conviction must be reversed; alternatively, this Court should exercise the power of supervision over the lower federal courts and reverse petitioner's conviction, since the trial court's actions were a substantial departure from the accepted and usual course of judicial proceedings, and this departure was sanctioned by the Court of Appeals in its failure to respond to the trial court's error, much less correct it.

V. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE TRIAL JUDGE INSTRUCTED THE JURY THAT IT COULD CONSIDER EVIDENCE OF UNCHARGED MISCONDUCT AS PROOF OF HIS GUILT, AND WHERE THE PROSECUTOR ARGUED SAID UNCHARGED MISCONDUCT TO THE JURY IN VIOLATION OF COURT ORDER.

At the trial, evidence was received of certain conduct and acts of petitioner which allegedly constituted "wrongs" or misconduct of petitioner, but which were not charged against petitioner in the indictment.*

While such evidence may be admissible against a defendant in a criminal case for limited purposes such as,

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* Said evidence included (1) foredating and backdating of annuity policies; (2) the two suspensions of FSL, petitioner's insurance company, by the Arizona Insurance Commissioner; (3) the liquidation of FSL; (4) the issuance of single premium annuity policies by FSL in consideration for the execution of premium notes; (5) the issuance of annuity package documents in locations other than where indicated on their face; and (6) that reservation of benefits and proceeds riders issued in connection with the single premium annuities were in some cases required to be approved by the Arizona Department of Insurance.

e.g., showing intent, absence of mistake, modus operandi and complete transaction, this Court and, as far as petitioner is aware, all common law jurisdictions require that the jury be appropriately cautioned as to the limited purpose of such evidence to avoid the obvious possibility that a jury might convict a defendant for acts or conduct other than those with which he is charged in the indictment. Baker v. U.S., 310 F.2d 924, 929 (9th Cir. 1962); Anthony v. U.S., 256 F.2d 50, 52-53 (9th Cir. 1958); U.S. v. Parker, 469 F.2d 884, 889-891 (10th Cir. 1972). As this Court has held in connection with the duty of the trial judge to properly and fully charge the jury:

> "It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal." Bird v. U.S., 180 U.S. 356, 361 (1901).

This fundamental principle was ignored in this case.

At the instruction conference, petitioner's counsel submitted six proposed instructions which would have charged the jury that this evidence could not be considered by it as evidence of petitioner's wrongdoing; however, over petitioner's strenuous objection, the trial court not only refused to give instructions as proposed, but modified them in such a way so as to instruct the jury that, while it could not consider such evidence "standing alone" as any evidence of petitioner's wrongdoing, it could consider these items of evidence "along with all the other evidence in the case." * The trial court's recognition that these items of evidence could not be considered by the jury as proof of petitioner's guilt of the

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* The six proposed instructions juxtaposed with the six instructions as given by the trial court, are attached hereto as Appendix E-1 through E-6.

charges against him--as shown by the "standing alone" language--was completely and effectively nullified when the trial judge affirmatively allowed the jury to consider this evidence with all the other evidence, without in any way cautioning the jury as to the limited use it could make of this evidence.

The effect of instructing the jury that it could consider these alleged six uncharged misdeeds together with all the evidence in determining petitioner's guilt was exacerbated when the prosecutor, in closing argument, argued these uncharged acts of misconduct as proof of petitioner's guilt, in direct violation of the trial court's admonition that he not do so, and after a lengthy discussion between counsel and the trial court prior to the trial court's admonition. (O 115-123)

> "MR. SMALTZ: I have stated my position for the record.
>
> "THE COURT: Well, [Mr. Lebowitz] where are you going to stand on the useless individual items like that? Are you going to argue them or not, or are you going to couch your argument in terms of the real crux of your case, which is the lulling letters?
>
> "MR. LEBOWITZ: I have intended to do that.
>
> "THE COURT: Huh?
>
> "MR. LEBOWITZ: I have intended to do just that.
>
> "THE COURT: Okay. Do it, then, and we won't have a problem on appeal." (O 123)

In direct defiance of this admonition, and despite his express representations to the contrary, the prosecutor proceeded to argue these items of evidence as proof of petitioner's guilt. (O 274, 279, 281, 285-286 and 289) Additionally, the prosecutor went out of his way to emphasize to the jury that the trial court would be instructing

it to consider all these matters with "all of the other evidence." (O 289)

It is submitted that petitioner was denied fundamental due process rights when the trial judge instructed the jury that it could consider evidence of uncharged misconduct against petitioner as proof of petitioner's guilt of the charges alleged in the indictment, and where such evidence was argued to the jury by the prosecutor in direct violation of the trial court's order. The Memorandum Decision of the Court of Appeals below has no reference to this issue, which was fully presented to it in the appellate briefs filed with said court. We submit that if this Court does not reverse petitioner's conviction because of the fundamental deprivation of due process, this Court should exercise its supervisory powers and reverse the conviction because of the substantial departure in the courts below from the accepted and usual course of judicial proceedings.

VI. PETITIONER WAS DENIED DUE PROCESS OF LAW WHERE THE GOVERNMENT DESPITE HIS REQUEST FAILED TO REVEAL THE FULL DETAILS OF A PLEA BARGAIN ARRANGEMENT MADE WITH THE KEY GOVERNMENT WITNESS AND AFFIRMATIVELY MISLED THE JURY AS TO THE TRUE NATURE OF SAID AGREEMENT.

At the trial, it was revealed that the Government had entered into a contingency plea bargaining "arrangement" with petitioner's co-defendant Edwin Newman (the key Government witness against petitioner)* whose case was severed

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* Newman, an attorney and since 1959 an associate of petitioner's and number two man in petitioner's organization, was on the stand for five days; he had been intimately connected with petitioner's business activities for over a decade (J 127-128); he was vice-chairman of the board of FSL and president of FGCC (J 130) he was a signatory to all the correspondence emanating from FSL to the lenders, and all the count letters from FSL emanated from him; along with another attorney, he had provided the form of responses to the lenders that FSL utilized, which resulted in petitioner's indictment. (J 341-345)

from petitioner's on the very day the trial was scheduled to begin and seven days before the trial actually commenced. (C.T. 572-574) The written plea bargain agreement, which was represented to petitioner, his counsel, the jury and the trial court as the full and entire agreement between the Government and Newman is attached hereto as Appendix F. It provided in substance that if petitioner pleaded guilty to a felony as charged in the indictment, Newman would plead guilty to two misdemeanor violations of 26 U.S.C. § 7203, and the Government would recommend probation; however, if petitioner was found guilty by a jury after a trial (which is what occurred) and if Newman testified against petitioner in accordance with his statements given to the U. S. Attorney, then upon the U. S. Attorney's exercise of discretion Newman would plead guilty to one count of the indictment (i.e., a felony) and the Government would recommend probation.

On cross-examination of Newman, petitioner's counsel sought to elicit all the details concerning said agreement and the events that led up to it. Newman made reference to discussions between the Government and his counsel concerning offers to testify, meetings on this subject and documents concerning plea-bargaining arrangements. (K 164-168) Newman denied that the Government would permit him to plead to a misdemeanor if he testified at petitioner's trial, even though he recognized that he would lose his license to practice law if tainted with a felony, and that the practice of law was of "paramount interest" to him. (K 184-185)

Thereafter, in order to discover all information in the hands of the Government pertaining to its plea-bargaining arrangement with Newman, petitioner moved the

trial court, both orally and by way of written motion, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. U.S., 405 U.S. 150 (1972), to require the Government to produce all evidence that related to said plea bargain. (C.T. 361 at 364) (L 101) The motions were denied, and the Government produced nothing. (L 57, 103)

During the Government's closing rebuttal argument, the prosecutor flatly told the jury that Newman had no option to plead to a misdemeanor, that there was no deal with Newman to let him plead to a misdemeanor, and that any suggestion by petitioner's counsel to the contrary was his imagination. (O 259)

On December 17, 1973, approximately ten weeks after petitioner was sentenced and his Notice of Appeal filed, the indictment against Newman was dismissed and he was allowed to plead guilty to two misdemeanor violations of 26 U.S.C. § 7203, and he was placed on probation. (C.T. 546, 579-580)

The record is crystal clear that the Government not only wilfully kept from petitioner's counsel and the jury the full details of its agreement with Newman, but affirmatively misled the jury as to its true nature. Contrary to the prosecutor's misrepresentation, the fact is that the Government not only had the option of giving Newman a misdemeanor after his testimony at petitioner's trial, and upon petitioner's conviction, but it also exercised that option. With Newman's testimony the key to the Government's case against petitioner, and with his credibility a central issue in the case, summary reversal of petitioner's conviction under these circumstances is mandatory. Napue v. Illinois, 360 U.S. 264 (1959); Brady, supra; Giglio, supra.

The Court of Appeals, in its Memorandum Decision

below, stated that the Government's decision "to go somewhat further than the written agreement provided" to allow Newman to plead to a misdemeanor was "made after the trial." (Memorandum, p. 10) There is no evidence in the record to support the Court of Appeals' conclusion that the decision to allow such a plea was in fact made after the trial, except for the unsworn assertions of the prosecutor in the Government's brief filed with the Court of Appeals. On the contrary, the circumstantial evidence is overwhelming that Newman was in fact expecting to plead to a misdemeanor when he testified, considering the value and necessity of his testimony to the Government's case, his intimate cooperation with the prosecutor throughout the proceedings, and the fact that he did ultimately plead to a misdemeanor. Petitioner attempted to seek all possible evidence that would pertain to the plea bargain arrangement during the trial, but was denied the opportunity to do so.

We submit that pursuant to this Court's decisions in Ring v. U.S., ____ U.S.____, 95 S.Ct. 164 (1974), and DeMarco v. U.S., 415 U.S. 449 (1974), if this Court chooses not to summarily reverse petitioner's conviction, at the very least a remand to the district court for an evidentiary hearing is required in order to pinpoint exactly what the full arrangements between Newman and the Government were, and when they were made.

The Court of Appeals in its Memorandum Decision further found no prejudice to petitioner because he was informed that there had been an agreement "for recommended probation" and petitioner was given "full opportunity to cross-examine Newman concerning promises." (Memorandum Decision, p. 10) We submit that the Court of Appeals totally

missed the point. Probation for Newman was only one relevant aspect of any deal that might have been made between him and the Government; the crucial consideration was whether Newman was going to be allowed to plead to a misdemeanor or to a felony -- the latter event leading to much more serious consequences for Newman, including being disbarred from practicing law.

Further, whether petitioner had an opportunity to cross-examine Newman concerning promises is irrelevant to the due process issues raised herein, and the duty of the Government not to suppress evidence or deliberately mislead and misinform the jury as was done here. Indeed, in Giglio, supra, defense counsel "vigorously cross-examined" the Government witness in seeking to reveal any deal between the Government and said witness -- and it was precisely because such cross-examination did not in fact bring out the truth as to the relationship between the Government and the witness that required a reversal in Giglio, as it does in the instant case.

VII. PETITIONER WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS WHEN THE TRIAL COURT REFUSED TO LET PETITIONER'S ATTORNEYS TESTIFY AS TO THE GOVERNMENT'S THREAT TO INDICT A KEY DEFENSE WITNESS AND TO A MAJOR GOVERNMENT WITNESS' PRIOR INCONSISTENT STATEMENTS.

In Washington v. Texas, 388 U.S. 14, 19 (1967), this Court held that:

> "The right to offer the testimony of witnesses and to compel their attendance if necessary, is in plain terms the right to present a defense * * *. Just as an accused has a right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense and this right is a fundamental element of due process of law."

Just last term in U.S. v. Nixon, ___ U.S. ___, 94 S.Ct. 3090, 3109 (1974), this Court clearly reaffirmed these principles:

> "The right to the production of all evidence at a criminal trial . . . has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and, 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced."

These fundamental rights of petitioner were trampled on by the trial court and the Court of Appeals when they effectively held that: An attorney for a defendant in a criminal case is incompetent as a matter of law as a witness for the defense. This holding finds no support in any federal law or case. See Annotation, Attorney As Witness for Client in Federal Case, 9 A.L.R.Fed. 500.

At the trial, petitioner sought to present evidence through the testimony of his lead trial counsel, Mr. Smaltz, that the prosecutor had threatened to indict a proposed defense witness (Schwartz) if said witness testified for the defense.

Additionally, through associate trial counsel, Mr. Nazarian, petitioner sought to prove that a major Government witness (Skillman) had made a statement to Mr. Nazarian prior to trial totally inconsistent with his trial testimony concerning his motives for testifying. Each attorney's proposed testimony was presented to the trial court by way of an offer of proof outside the presence of the jury. (L 259-262, 265-266)

The trial court simply ruled that no attorney in the case would be permitted to testify (L 278), but gave no

reason for its ruling. Assuming that the trial court's refusal to allow such testimony was based on its belief that the attorneys were not competent to testify, the trial court committed plain error, affecting petitioner's substantial rights.

Petitioner is unaware of any case which makes an attorney incompetent to testify on behalf of his client solely because of the attorney-client relationship. Ethically, where the events giving rise to his testimony could not have been anticipated prior to the time he accepted the representation of the client, and the testimony is relevant and material to the client's cause, it is essential that the attorney come forward and testify. ABA Code of Professional Responsibility, Ethical Consideration 5-10.*

The Government's efforts to intimidate Schwartz from testifying occurred when, four days before trial was scheduled to commence, the prosecutor called Mr. Smaltz and told him that there was a significant possibility that Mr. Schwartz would be indicted if he testified and that Mr. Schwartz should receive his Fifth Amendment admonition before he testified, and that Mr. Smaltz should tell that to Mr. Schwartz. (L 259-260) Mr. Smaltz advised Mr. Schwartz.

Mr. Schwartz had served as one of FSL's attorneys during the interval covered by the indictment, and his testimony was totally consistent with petitioner's position

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* This consideration provides: "In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness.[12] "

Footnote 12 thereto provides: "It is a general rule that a lawyer may not testify in litigation in which he is an advocate unless circumstances arise which could not be anticipated and necessary to prevent a miscarriage of justice. In those rare cases where the testimony of an attorney is needed to protect his client's interests, it is not only proper but mandatory that it be forthcoming. (Citation omitted)" Ethical Consideration 5-10, and Footnote 12 thereto, ABA Code of Professional Responsibility.

and contrary to the testimony of the key Government witness Newman on the latter's role and advice which Newman gave to petitioner. The threat was communicated to counsel on May 11, which was the day after Newman agreed to testify for the Government and was designed to inhibit the defense efforts to challenge Newman's testimony.*

The trial court found the prosecutor's conduct "highly improper . . . under the circumstances of this case," but refused to permit petitioner to bring this conduct to the attention of the jury. (L 296)

The relevance of Mr. Smaltz's proposed testimony cannot be questioned -- it tended to show the Government's conscious weakness of its case against petitioner, a well-known and time honored evidentiary principle, and petitioner would have been entitled to an appropriate jury instruction and to argue this principle to the jury.** U.S. v. Katz,

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* The prosecutor's action was designed to and did have a "chilling effect" on Schwartz, who when called as a witness by petitioner addressed the court outside the presence of the jury, narrated the facts that he had been interviewed in 1968 by the Postal authorities, had been in contact with the U. S. Attorney since 1969, and that no action or suggestion of his criminal involvement had ever been expressed until Mr. Smaltz told him of the prosecutor's threat. Schwartz refused to testify on behalf of petitioner. (L 291) At the direction of the court, Schwartz was granted immunity and ultimately he testified. (L 296-297) The Government was aware of the nature of Schwartz's testimony and his importance to petitioner's case, since it had petitioner under electronic surveillance between January 25 and March 6, 1973 and had intercepted conversations between petitioner and his attorney. (A 115-141) The fact that eavesdropping had been conducted had previously been denied by the Government, who only admitted it after petitioner brought it to the court's attention pursuant to an article in the April 29, 1973, edition of The New York Times. (C.T. 231-253)

** "It has always been understood - the inference, indeed, is one of the simplest in human experiences - that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his
[cont'd on next page]

78 F.Supp. 435, 438 (M.D.Pa. 1948); U.S. v. Vole, 435 F.2d 774, 778 (7th Cir. 1970).

In the context of the circumstances of this case, the inability of petitioner to present this evidence to the jury monumentally prejudiced petitioner, since Schwartz was the one witness in a position to refute much of Newman's testimony which was so damaging to petitioner, and the prosecutor was well aware of this fact. Additionally, petitioner had been claiming that the Government was using coercive tactics with regard to other witnesses which it called to influence those witnesses' testimony, and this testimony regarding Schwartz would have corroborated this claim.

Mr. Nazarian's proposed testimony would have flatly impeached the testimony of Skillman, a key Government witness whose testimony covers 1,096 pages of transcript. Skillman had pleaded guilty to the indictment and had been sentenced prior to petitioner's trial. He was also serving concurrently the first year of a seven-year sentence on a previous conviction unrelated to this matter. (G 29-30)

Skillman had been maintained by the Government at a hotel in Phoenix from May 5, 1973, through the trial and even after the close of the evidence on July 12. (G 29-30) On direct examination, over petitioner's objections, the Government elicited statements regarding Skillman's cooperation as a Government aide in this and other cases, and asked Skillman whether his "placement in a motel" was at his "insistence" or the Government's arrangement. Skillman denied

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[cont'd]

consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates indefinitely though strongly, against the whole mass of alleged facts constituting his cause." Vol. II, Wigmore on Evidence, p. 120, § 277, 3d Ed. 1940. (Emphasis added.)

that he insisted on it or that it was at his behest. (E 417-423) Nazarian would have testified that Skillman had told him in a pretrial interview on January 31, 1973, that if he were going to testify on behalf of the Government he required comfortable accommodations and would not stay at the county jail; that he had no sympathy for the lenders (the supposed victims in this case who at trial disclaimed knowledge of the arrangements between the annuitants and FSL) since the lenders were attempting to "clean up" old loans by virtue of their previous dealings with the annuitants. (L 265-266) Skillman not only testified contrariwise on direct; he also on cross-examination denied making any of these statements. (L 266)

Thus, Nazarian's testimony would have impeached Skillman's testimony on both direct and cross-examination and demonstrated Skillman's bias against petitioner. It was a theory of the defense that Skillman would say anything, whether fact or fiction*, to convict petitioner as long as the Government kept him comfortable, and considering that the lengthy prison sentence he had begun serving might be shortened, since the Government was going to seek an early parole for Skillman. (G 40-41)**

At the offer of proof, the trial court was informed that Mr. Nazarian would withdraw as associate

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* Skillman purported to testify in practically ipsissimis verbis to no fewer than 83 conversations with petitioner between August, 1968, and April, 1969. (E 414 - H 235) His trial testimony contradicted his other prior statements in various ways--most particularly in his attribution to petitioner of actions and responses that he had previously attributed to Newman. Thus, Skillman was able to shift all of the responsibility from Newman to petitioner.

** The significance of Nazarian's proposed impeachment of Skillman becomes even greater, considering the prosecutor's statement in closing argument that Skillman had to stay in a motel because the only federally-approved detention center was at least 60 miles from the courthouse. (O 257-258) Not only did this constitute flagrant prosecutorial misconduct, as there was no evidence to support this "fact," but as petitioner found out after trial, the statement was patently false--the Government had been utilizing the Maricopa County jail in Phoenix since several months prior to trial. See Memorandum, p. 9.

counsel if the court would permit his testimony. The court refused. (L 288)*

In Davis v. Alaska, 415 U.S. 308 (1974), this Court, in the context of the scope of the confrontation clause, held that the Constitution mandated a defendant's right to fully probe by way of impeachment the possible bias of a Government witness because of his vulnerable status as a probationer. This Court long ago recognized the constitutional right of a defendant to impeach a witness by showing that his testimony was biased because of his being in federal custody at the time of trial. Alford v. U.S., 282 U.S. 687 (1931).

It was essential that petitioner be allowed to fully impeach Skillman in connection with his bias against petitioner and his motives for testifying. It is submitted that the failure of the trial court to allow petitioner his right to impeach a key Government witness "[withheld] from the jury information necessary to a discriminating appraisal of [the witness's] trustworthiness to the prejudice of petitioner's substantial rights." Gordon v. U.S., 344 U.S. 414, 417 (1953).

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* Under the circumstances present in this case, even this offer to withdraw was not legally or ethically required. See page 34, supra. No offer was made by Mr. Smaltz to withdraw as counsel in connection with the threat to Mr. Schwartz, since it would have been futile. The trial court had previously denied a motion by Mr. Smaltz to withdraw for other reasons two months before the trial because of the delay this would have caused; and associate counsel, Mr. Nazarian, who had never tried any case, criminal or civil, in any court, could not have conducted the trial.

VIII. THERE IS NO WORK PRODUCT EXCEPTION TO THE JENCKS ACT, AND WHERE A GOVERNMENT ATTORNEY TAKES NOTES FROM THE KEY PROSECUTION WITNESS AND READS THOSE NOTES BACK TO THE WITNESS WHO CORRECTS SAME, THE NOTES ARE COMPELLABLE UNDER BOTH THE JENCKS ACT AND BRADY V. MARYLAND.

Four days before the scheduled commencement of trial, Newman made his deal with the Government and participated in a 2-1/2 hour question and answer session with the Government attorneys, which resulted in a 90-page sworn statement. The statement concluded with the prosecutor's representation that:

> "We intend to continue this discussion off the record at a later time this weekend, and there are individuals . . . as well as Goldberg transactions . . . which will be explored at a further time." (K 182)

Petitioner was furnished with a copy of this statement.

Thereafter, Newman met on at least five separate occasions with Government attorneys. The meetings were lengthy and there was no reporter present. At those meetings the only record of what Newman said was the notes of the two prosecutors, which they would read back to Newman from time to time, and Newman would correct them.* (K 177-180)

Newman's direct testimony at trial spanned 440 pages of reporter's transcript and covered a multitude of matters which were not noted in this sworn statement to the Government.

At the commencement of cross-examination of Newman, petitioner promptly moved pursuant to the Jencks Act for production of the notes taken by the Government attorneys. The trial court denied the motion on the basis that there was a "work product privilege" that protected the notes.

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* Neither petitioner nor his counsel was present at any of these meetings.

Thereafter, petitioner renewed his motion (K 184) and requested that the court at least conduct an in camera inspection. The trial court refused to even examine the notes and again denied the motion. (K 240-241) Petitioner subsequently renewed his motion, contending that there was no work product exception and, even if there were, the material was compellable under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. (C.T. 381-384) It was denied.

At no time did the trial court ever examine the notes, and they were never made a part of the record. In its brief to the Court of Appeals, the Government contended that there was an in camera inspection of the notes; but at oral argument, they withdrew that contention and instead lodged a two-inch thick packet of papers with the Court of Appeals which the prosecutor described blithely as "the notes."

There is no work product exception in § 3500. Indeed, it expressly requires that after a witness has testified on direct:

> "The court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 USC § 3500(e) (Emphasis added.)

At least two circuits have squarely held that there is no work product exception. U.S. v. Smaldone, 484 F.2d 311, 317 (10th Cir. 1973) ["We recognize there is not a work product exception as such."]; and U.S. v. Hilbrich, 341 F.2d 555, 557 (7th Cir. 1965), cert. denied, 381 U.S. 941 (1965) ["There is no 'work product' exception to the Jencks Act."].

The Panel below resolved petitioner's contention as follows:

> "Apart from the question whether such notes were exempt from the Jencks Act (18 USC § 3500) as 'work product' they were not statements of the

> defendant within the meaning of 3500(e). We find no clear, prejudicial error." (Memorandum, p. 8) (Emphasis added.)

Petitioner never contended the notes were his statements--but rather the statements of the witness Newman.

Petitioner does not know whether the Court of Appeals examined the notes tendered to it by the prosecutor. Petitioner assumes that it did; otherwise, the observation that the notes do not constitute statements is inexplicable.

The Jencks Act vests in the trial court the primary responsibility for resolving disputes about whether or not notes constitute a statement, which court is required by the terms of the Act to conduct an in camera inspection.* Here the trial court refused. If the decision of the trial court after a preliminary examination had been adverse, petitioner would at least have had the opportunity to take additional extrinsic evidence to the statement and conditions under which it was taken. Ogden v. U.S., 303 F.2d 724, 732-733 (9th Cir. 1962). See also, Hilliard v. U.S., 317 F.2d 150 (D.C. Cir. 1963).

How the Court of Appeals was able to make an ex parte determination when the papers left with it were not part of the record and not submitted through a procedure that entitled petitioner to challenge the accuracy of the Government's counsel's assertions as to completeness or authenticity, is an anomaly. There is no rule of law or precedent for such a procedure, and the utilization of same flat out violates the commandments of the Jencks Act. Palermo v. U.S., 360 U.S. 343, 349 (1959); and Campbell v. U.S., 365 U.S. 85, 93 (1961).

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* § 3500(c) provides: "If the United States claims that any statement ordered to be produced . . . does not relate to the subject matter of the testimony of the witness . . . the court shall order the United States to deliver such statement for the inspection of the court in camera."

The Panel, in apparently holding that the "notes" did not constitute statements, ignored not only this Court's holding in Palermo, supra, but also the witness's own testimony that the notes were read back to him from time to time for correction (K 177-180), and the Government's contentions that the notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached." (Government's Brief to the Ninth Circuit, p. 64.) The express language of § 3500(e) defines a statement of the witness as follows:

> "The term 'statement,' as used . . . means
>
> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him."

This Court has held that the doctrine of harmless error should be employed with restraint in Jencks Act cases, Rosenberg v. U.S., 360 U.S. 367 (1959), stating:

> "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withholding documents to which the defendant is entitled." Id., 360 U.S. at 371.

In Clancy v. U.S., 365 U.S. 312 (1961), the Court rejected the Government's harmless error argument, stating:

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been used effectively." Id., 365 U.S. at 316.

Petitioner's repeated motions for the Government's notes of interviews with Newman were not only premised on the Jencks Act, but also the rule of Brady v. Maryland, 373 U.S. 83 (1963). (L 57) (C.T. 361-364) The Panel below never reached this question. Since the notes were prepared only after the prosecutor and the witness Newman arrived at a "mutual understanding," anything in the notes that contradicted the witness or explained any transaction in a fashion

that was consistent with petitioner's innocence, or tended to exculpate petitioner, or was otherwise useful to petitioner, was nevertheless compellable under the Brady rationale, whether or not it was a "statement" for Jencks Act purposes. The court's failure to order the Government to turn over same to petitioner constituted reversible error. See "Comment, Brady v. Maryland, and the Prosecutor's Duty to Disclose," 40 U.Chic.L.Rev. 112, 119-120 (1972).

The rule established by the Circuit in this case is contrary not only to the holdings of the Seventh and Tenth Circuits in Smaldone, supra, and Hilbrich, supra, but also to the express requirements of 18 U.S.C. § 3500. This Court should issue a writ of certiorari to resolve this issue.

CONCLUSION

For the foregoing reasons, the writ should issue.

DATED: April 2, 1975.

Respectfully submitted,

DONALD C. SMALTZ
and
ANDREW I. SPILKER

By /s/ Donald C. Smaltz
DONALD C. SMALTZ

Attorneys for Petitioner

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. PHILIP J. GOLDBERG, *Defendant-Appellant.*	No. 74-1023 MEMORANDUM

[December 18, 1974]

On Appeal from the United States District Court for the District of Arizona

Before: KOELSCH and KILKENNY, Circuit Judges and SWEIGERT, District Judge*

Appellant Goldberg appeals from a judgment imposed by the Court after his conviction by a jury on fourteen counts of an indictment charging violation of 18 U.S.C. § 1341—use of the mail to defraud. He was sentenced to a term of two years imprisonment on each of the 14 counts, the sentences to be served concurrently, and a fine of $1,000 on each count.

Each of the 14 counts charged appellant with a separate transactional instance of use of the mail for the purpose of executing a scheme and artifice to defraud. The scheme alleged in each count was in substance and to the effect that appellant, as President of Financial Security Life Insurance Company, caused the company to issue to various individuals certain so-called single premium annuity policies, purporting to be premium fully prepaid, with a view to their use by the annuitant as collateral for

*The Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

borrowing money from banks and other lending sources; that when lenders, considering such loans, inquired of Financial Security Life Insurance Company (FSL) concerning the status of such policies, appellant caused certain false statements to be made, i.e., that the premiums were paid in full—whereas no payments except interest payments had been made on certain promissory notes accepted by FSL as premium payment; that there were no liens or encumbrances of record against the policies offered as collateral—whereas certain reservations of benefits and proceeds riders reduced the policies to virtually zero; that the face amount of the policy was the cash surrender value that would be paid to the annuitant after the due date specified in the policy whereas said policies were worthless; that appellant concealed and withheld from the lenders the material facts that promissory notes had been accepted by FSL in payment of premiums and that the policies were subject to riders providing that the policies would be reduced by the total amount unpaid; that when the policies issued by FSL were accepted by lenders as collateral and presented for payment the lenders would then be informed by appellant that no amounts were payable because no payments had been made on the promissory notes.

It was contended by appellant at the trial that the policies in question had been properly issued, that the false statements to the lenders "were believed to be correct" and that appellant "had relied upon the advice of his various attorneys." (App. Opp. Brief, p. 6)

Appellant makes no contention that the evidence, if believed by the jury, would be insufficient to support findings adverse to appellant on those issues of fact.

Appellant makes no contention that the evidence, if believed by the jury, would be insufficient to support findings adverse to appellant on those issues of fact.

Appellant asserts insufficiency of the evidence only with respect to the use of the mails element of the case, i.e., (1) the implied finding that the letters referenced in Counts 10 and 12 had been placed in the mail, and (2) the implied finding that the mailings referenced in Counts 2, 12, 16, 4 and 14 were for the purpose of executing, within the meaning of Section 1341, the scheme alleged in those Counts.

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Other grounds for reversal presented by appellant have to do with claimed errors of the trial judge.

RE INSUFFICIENCY OF THE EVIDENCE

1. *Counts 10 and 12—re Proof of Mailing*

It is well established that one "causes" the mails to be used, within the meaning of Section 1341, when he does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954).

Appellant here does not contend in his brief that the letters referenced in the above counts, if mailed, were not so "caused" to be mailed by him; he contends only that there is insufficient evidence to support the finding that the letters referenced in Counts 10 and 12 were actually placed in the mail.

The mailing of the letter referenced in Count 10, Exhibit 13A, a letter of December 31, 1968, allegedly mailed by one Hoover of Western General Corporation to FSL, was supported only by the testimony of Newman (of FSL) to the effect that he received the letter in the mail. However, Hoover could not recall whether he had mailed that letter to Newman or had delivered it to one Kenslow for delivery to Newman. There is no evidence concerning Hoover's customary practice concerning how letters of this kind were transmitted. The evidence shows, however, that shortly after the date of the letter Hoover and Kenslow did come to Phoenix where Kenslow personally presented the annuity policies referred to in the letter, along with other documents, to Newman. Although a copy of the letter appeared in FSL files, no receipt stamp appears on its face; Newman's testimony about receiving the letter "in the mail" was qualified by adding: "as far as I can determine."

The letter referenced in Count 12 was a letter dated January 24, 1968 (Ex. 10B), allegedly mailed by Newman of FSL to one Skillman of American Mortgage Company. Exhibit 10B was an unsigned copy of the letter. There is no testimony from anyone at FSL concerning the mailing of the letter nor any testimony concerning the custom and practice relating to the mailing of such letters. Newman merely testified that Exhibit 10B was a

copy of a letter of January 24, 1969 from him to Skillman. Neither the original of the letter nor the envelope was produced at trial. The copy was received in evidence upon testimony of Skillman that he "received" the letter in the mail.

It is settled that use of the mails, like most other facts, need not be established by direct evidence; it may be established by circumstantial evidence provided, of course, that the circumstances are such as to reasonably support an inference of mailing beyond reasonable doubt. *United States v. Fassoulis*, 445 F.2d 13, 17 (2d Cir. 1971). Appellant contends, however, that there is no such evidence of the mailings referenced in Counts 10 and 12.

An examination of cases discussing the standards and guidelines for proof of the mailing requirement of Section 1341 (*United States v. Fassoulis*, supra; *United States v. Leathers*, 135 F.2d 507 (2d Cir. 1943); *Whealton v. United States*, 113 F.2d 710, 713 (1940); *United States v. Baker*, 50 F.2d 122 (2d Cir. 1931); *Mackett v. United States*, 90 F.2d 462 (7th Cir. 1937); *Freeman v. United States*, 20 F.2d 748 (3d Cir. 1927), leads us to the conclusion that proof of mailing the letter referenced in Count 10 falls far short of the guidelines set by even the most liberal of these cases, e.g., *Fassoulis*, *Leathers*, supra) and is insufficient within the meaning of such cases as *Baker*, supra; *Freeman*, supra; *Mackett*, supra and *Whealton*, supra.

We are of the opinion, however, that within the meaning of *United States v. Leathers*, supra, the evidence is sufficient to support the implied finding of the mailing of the letter (Ex. 10B) referenced in Count 12.

2. *Re Counts 2, 12, 16, 4 and 14—re Proof that Mailing in Execution of the Schemes Charged*

Again we note that appellant makes no contention that the letters referenced in the above counts, if they were mailed in execution of the alleged scheme, would not have been "caused" to be mailed by appellant within the meaning of Section 1341. Defendant argues only that the letters were not "for the purpose of executing the scheme" within the meaning of the statute.

Since we have already determined that the convictions on Count 10 must be reversed for failure to prove mailing of the letter ref-

erenced in that count, it is unnecessary to consider defendant's further contention that the letters were not in execution of the scheme.

The letter referenced in Count 2, Exhibit 4A, was a letter dated July 31, 1968, from one Tucker to FSL, relating to single premium life insurances policies—not single premium annuities. Appellant contends that, therefore, it could not be considered to be in furtherance of the scheme charged in Count 2 which refers only to annuities.

The evidence is to the effect that in the summer of 1968 one Tucker, a New York financial broker, had called FSL to discuss mortgage loan commitments and later to discuss the issuance of single premium life insurance policies (not annuity policies). Eventually, Tucker visited FSL at Phoenix and discussed single premium life insurance policies with defendant. It was not, however, until near the end of August, 1968, i.e., after the date of his July 31, 1968 letter, that Tucker for the first time discussed with defendant the possibilities of using single premium annuities.

We find no merit in appellant's narrow point; the correspondence in question led to the ultimate use of annuity policies. Although the July 31, 1968 letter refers only to life insurance policies (as distinguished from annuity policies), Tucker's subsequent contribution of ideas concerning annuity policies stemmed from that earlier correspondence and the letter, therefore, can be deemed to have been in that sense in furtherance of the scheme charged.

The letter referenced in Count 16, Exhibit 5Y, was a letter dated May 6, 1969, from Royal National Bank to FSL demanding that FSL make payment to the bank of certain annuities under a policy which the bank had previously accepted as collateral for a loan. The evidence is to the effect that the letter, making demand for payment by FSL, was mailed 18 months after the bank had actually accepted the policies as collateral.

Appellant contends, citing and relying on *United States v. Maze*, 414 U.S. 395 (1974); *Parr v. United States*, 363 U.S. 370 (1960); *Kann v. United States*, 323 U.S. 88 (1944), that the scheme had reached fruition when the bank accepted the policies

as collateral and that, therefore, the letter could not be considered to have been in execution of the scheme charged in Count 16.

In *Maze*, supra, the letter in question was mailed to a bank by the true owner of the bank's credit card requesting adjustment of his account after *Maze*, the defendant in that case, had stolen and misused the credit card to obtain lodging at various motels. The court held (p. 402) that Maze's scheme had already reached fruition when he checked out of the motels and that there was no indication that the success of his scheme depended in any way on the adjustment of loss between his victims.

In the present case, however, the letter in question was from the bank which had been victimized by its acceptance of the policy as collateral, but it was written, not to another victim (as in *Maze*), but to the defrauder, himself, seeking, not merely to adjust a discovered loss, but to realize on the policy collateral, something that appellant herein would reasonably have expected to happen at some time during the period the bank held the collateral in reliance upon appellant's false representation.

Whether a mailing is in furtherance of a scheme does not depend upon mechanical determination of when the mailing occurs but upon a determination of the contribution made by the mailing to the scheme's success. *United States v. Kelem*, 416 F.2d 346, 350 (9th Cir. 1969).

We are of the opinion, therefore, that here, appellant's scheme had not reached fruition, as in *Maze*, but was in effect continuing up to the time of writing the letter (Ex. 5Y) the mailing of which was caused by appellant and was also in this sense in execution of the scheme.

The letter referenced in Count 4, Exhibit 8B, was a letter dated December 17, 1968, from Newman of FSL to Herman of First National Bank of Mason City in response to a letter inquiry from Herman, dated December 9, 1968, concerning an application of one Darden for a loan based on an FSL policy as collateral.

The evidence is to the effect that on the following day, December 10th (six days before FSL mailed the Count 4 referenced letter), Herman decided not to make the loan to Darden. Appellant contends that, therefore, the letter could not be con-

sidered as being in furtherance of the scheme charged in Count 4. (See App. Brief p. 85-101).

We cannot agree. The referenced letter (Ex. 8B) was obviously intended to further the scheme and the mere fact that appellant did not know that the bank had already decided to reject the loan for other reasons does not excuse appellant.

The letter referenced in Count 11, Exhibit 16C, was a letter dated February 7, 1969, from one Friedman of National Bank of North America to FSL inquiring concerning certain FSL policies presented to the bank on the previous day by one Kenslow as further collateral for loans which the bank had already made to Kenslow on January 7, 1969 and January 15, 1969 on the basis, according to defendant, of Kenslow's note rather than on the basis of the FSL policy collateral. Appellant contends that, therefore, Exhibit 16C could not be considered as in execution of the scheme alleged in Count 11; appellant makes a similar contention as to the letter referenced in Count 14, Exhibit 16F, a letter from Newman of FSL to National Bank of North America, dated March 21, 1969, responding to the Exhibit 16C letter referenced in Count 11.

We disagree. Obviously, the sending of Exhibit 16C by the bank indicates that the bank was relying, to some extent at least, on the further security of the policies. Appellant's response to the bank (Ex. 14) was, therefore, in furtherance of appellant's scheme.

RE ERRORS OF LAW

Defendant contends that the trial court erroneously refused to dismiss the indictment upon the grounds that it had been returned after only a one-hour grand jury hearing on other variously asserted charges of "perversion" by the government of the grand jury proceedings. We are satisfied that this ruling of the trial court did not constitute clear prejudicial error. See *United States v. Costello*, 350 U.S. 359 (1956).

Defendant contends that the trial court erroneously refused to order the government either to refrain from using or to deliver to defendant a copy of a so-called "jury book"—the United States Attorney's notes concerning the voting record and any known idiosyncracies of jurors on the panel. We are satisfied that this

refusal did not constitute prejudicial error even under the circumstances argued by defendant. See *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958).

Defendant further contends that the trial judge erroneously refused to order government disclosure of certain notes taken by Assistant United States Attorneys reflecting the substance of, but not verbatim, discussions with government witness Newman. These notes were taken in discussions with Newman after Newman's written statement of May 11, 1973 which was disclosed to defendant. Apart from the question whether such notes were exempt from the Jencks Act (18 U.S.C. § 3500) as "work product," they were not statements of the defendant within the meaning of § 3500(e). We find no clear, prejudicial error.

Defendant further contends that the trial court erred in permitting cross-examination of the defendant on matters which, defendant asserts, were beyond the scope of direct examination.

Considered in the light of the length and tenor of defendant's direct examination to the effect that his own conduct was free of any intent to defraud and that he was unaware of any improprieties and that he was victimized by his reliance on others, we cannot say that the cross-examination which was allowed by the trial court to refute defendant's testimony, was unreasonable or in excess of the bounds of cross-examination. We find no clear, prejudicial error.

Defendant further contends that the trial court erred in refusing to allow one of defendant's attorneys (Smaltz) to testify concerning an alleged government threat to indict a prospective defense witness (Schwartz) if he testified.

The trial court hearing on this point, held outside the presence of the jury, shows an offer of proof concerning, not a government threat against Schwartz, but only a government statement to defendant's counsel (Smaltz) to the effect that, if defendant intended to call Schwartz, he (defendant's counsel) should inform Schwartz of his Fifth Amendment rights because, if Schwartz testified, there was a considerable possibility he might be indicted; that defendant's counsel did so inform Schwartz; that, upon suggestion of the court, Schwartz was then granted immunity and did testify.

An examination of the record on this point satisfies the court that there was no abuse of discretion on the part of the trial court. We find no clear, prejudicial error.

Defendant contends that the trial court erroneously refused to allow one of the defendant's attorneys (Nazarian) to testify concerning claimed inconsistent statements of the government's witness (Skillman) to the effect that Skillman had stated to Nazarian during an interview with Skillman at the Holiday Inn in Phoenix just prior to the Goldberg trial, that he (Skillman) had informed an Assistant United States Attorney, that, if he (Skillman) was to testify for the government, he wanted comfortable accommodations and would not stay in a county jail—a statement which Skillman had on cross-examination denied making.

Considering the circumstances shown by the record we are of the opinion that the trial court's refusal to allow Nazarian, who had participated as defendant's counsel, to testify to the claimed inconsistent statements of Skillman was not in abuse of discretion. Skillman had been cross-examined by defendant's counsel on these statements allegedly made to Nazarian, yet Nazarian continued as co-counsel for two to three weeks thereafter without either withdrawing or indicating to the government that he was a potential witness in the case. We find no clear, prejudicial error.

Defendant further contends that during the government's rebuttal argument to the jury, government counsel made statements of fact, referring to Stillman's testimony above referred to but not shown by any evidence, to the effect that witnesses brought by the government from federal penitentiaries to testify, normally stay at the closest federally approved detention center, normally a jail within a city, but that Phoenix did not have such a federally approved detention center and the closest was at Florence—60 miles away.

Defendant contends that this statement was, not only outside the evidence, but also false. Defendant attaches to his brief a copy of a contract between the Bureau of Prisons and Maricopa County providing for detention of federal prisoners at the Maricopa County Jail. Defendant's counsel, conceding that no objection was made at trial to this claimed improper argument, explains that he did not know the true state of affairs until after the trial.

APPENDIX A

Appellee concedes that its remark concerning the non-existence of a federally approved jail near Phoenix was erroneously but innocently made and, further, that its remark concerning safety was made in a good faith attempt to indicate that prisoners who are called to testify for the government are sometimes kept apart from other prisoners in the interest of protecting the witness, not from the defendant in the case, but from other prisoners. Considering all the circumstances shown by the record, we are satisfied that the remarks of government counsel on these matters, which was quite collateral to the main issues, were not so out of line as to deprive defendant of a fair trial. We find no clear, prejudicial error.

Defendant contends that the trial court erroneously refused during the cross-examination of government witness, Newman, to make an order requiring the government to produce all its records of conversations between attorneys for Newman and attorneys for the government relating to the making of a written plea bargaining agreement with Newman that had been reduced to writing and disclosed to counsel for appellant.

Defendant argues that, although the written agreement was to the effect that Newman was to plead guilty to one count of the indictment and although Newman admitted to that effect on the stand, the government, after the Goldberg trial, actually permitted Newman to plead to new misdemeanor charges and dismissed the felony indictment charges.

On this point we are satisfied that the government's decision, made after the trial, to go somewhat further than the written agreement provided, did not amount to a failure to fully disclose a bargaining agreement with the witness Newman. Even if it did, it would not have prejudiced defendant who had been timely informed of the written bargaining agreement for recommended probation and given full opportunity to cross-examine Newman concerning promises. See, *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974). We find no clear, prejudicial error.

For the reasons above set forth the judgment of the District Court is affirmed except that the judgment on Count 10 is reversed.

FERNAU-WALSH PRINTING CO., SAN FRANCISCO 12-26-74—400

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 5 1975
CLERK
U.S. COURT OF APPEALS

FEB - 5 1975
Docketed

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PHILIP J. GOLDBERG,

Defendant-Appellant.

No. 74-1023

(Sc-70-517wfc)

Before: KOELSCH and KILKENNY, Circuit Judges, and SWEIGERT,* District Judge.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

The members of the panel voted unanimously to deny the petition for panel rehearing. Judge Koelsch voted against a rehearing in banc, and Judges Kilkenny and Sweigert recommended against such a rehearing.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. F. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

* The Honorable William T. Sweigert, United States District Judge for the Northern District of California, sitting by designation.

18 U.S.C. § 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has tesified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to the defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means -

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

APPENDIX C
(Page 2 of 2)

DEFENDANT'S PROPOSED INSTRUCTION:

39

Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case.

* * *

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

Devitt & Blackmar, Vol. 1, Section 11.30, modified.

C.T. 464

APPENDIX D

PROPOSED INSTRUCTION:

Z6

You have heard evidence that either all, or substantially all, of the single-premium annuity policies which were issued by Financial Security Life Insurance Co. were paid for by the execution of premium notes. You have also heard expert testimony to the effect that a premium note is valid consideration for the issuance of an annuity pursuant to the laws of the State of Arizona.

Therefore, you are not to infer, either directly or indirectly, that there was any irregularity or wrongdoing on the part of F.S.L. or the defendant, Mr. Goldberg, in issuing these single-premium annuities in exchange for the execution of a premium note.

U. S. v. Pfizer, 426 F.2d 32, 39 (2nd Cir. 1970), rehearing denied 437 F.2d 957 (2nd Cir. 1970).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 451

INSTRUCTION AS GIVEN:

You have heard evidence that either all, or substantially all, of the single premium annuity policies which were issued by Financial Security Life Insurance Company were paid for by the execution of premium notes. You have also heard expert testimony to the effect that a premium note is valid consideration for the issuance of an annuity pursuant to the laws of the State of Arizona.

Therefore, you are not to infer, either directly or indirectly, that, standing alone, there was any irregularity or wrongdoing on the part of FSL or the defendant on trial in issuing these single premium annuities in exchange for the execution of a premium note. However, you may consider this matter along with all other evidence in the case.

R.T. O 334-335

PROPOSED INSTRUCTION:

27

There has been undisputed testimony in this case regarding the fact that Financial Security Life Insurance issued certain single-premium annuity policies which bore issuance dates which were not necessarily the dates that said policies were delivered to the respective annuitants. You have also heard testimony from several witnesses that this is a custom and practice in the insurance industry.

Therefore, you are instructed not to consider the foredating or backdating of these single-premium annuity policies as any evidence of wrongdoing on the part of the defendant, Mr. Goldberg.

U. S. v. Pfizer, 426 F.2d 32, 39 (2nd Cir. 1970), rehearing denied 437 F.2d 957 (2nd Cir. 1970).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 452

INSTRUCTION AS GIVEN:

There has been undisputed testimony in this case regarding the fact that Financial Security Life Insurance issued certain single premium annuity policies which bore issuance dates which were not necessarily the dates that said policies were delivered to the respective annuitants. You have also heard testimony from several witnesses that this is not unusual in the insurance industry.

Therefore, you are instructed not to consider the foredating or backdating of these single premium annuity policies, standing alone, as any evidence of wrongdoing on the part of the defendant. However, you may consider these facts and this matter along with other evidence in the case.

R.T. O 335

PROPOSED INSTRUCTION:

28

There has been testimony that some of the documents that constituted the annuity package were executed in New York, New York and in San Francisco, California, whereas the documents indicate on their face that they were executed in Phoenix, Arizona.

These facts do not in and of themselves constitute any part of the charges in this case, and therefore, are not to be considered by you, either directly or indirectly, during your deliberations.

U. S. v. Pfizer, 426 F.2d 32, 39 (2nd Cir. 1970), rehearing denied 437 F.2d 957 (2nd Cir. 1970).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 453

INSTRUCTION AS GIVEN:

There has been testimony that some of the documents that constituted the annuity package were executed in New York, New York and in San Francisco, California, whereas the documents indicate on their face that they were executed in Phoenix, Arizona. Again, these facts, standing alone, do not in and of themselves constitute wrongdoing under the indictment. However, you may consider these facts also along with all the other evidence in the case.

R.T. O 335-336

PROPOSED INSTRUCTION:

29

You will recall that there was some testimony regarding whether or not the reservation of benefits and proceeds riders which were used in connection with these single-premium annuities were ever submitted for approval to the Arizona Department of Insurance. You will also recall that Mr. Humphrey, who is the Director of Insurance for the State of Arizona, recited from the Arizona Revised Statutes, specifically Section 20-1110, which exempts the reservation of benefits form used in connection with these annuities from any approval requirement.

Therefore, even if you were to conclude from the evidence presented that said reservation of benefits and proceeds rider was not submitted to the Department of Insurance for approval, you are not to consider that fact, either directly or indirectly, as any evidence of wrongdoing, in connection with your deliberation.

U. S. v. Pfizer, 426 F.2d 32, 39 (2nd Cir. 1970), rehearing denied 437 F.2d 957 (2nd Cir. 1970).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 454

INSTRUCTION AS GIVEN:

You will recall, also, that there was some testimony regarding whether or not the reservation of benefits and proceeds riders which were issued in connection with these single premium annuities were ever submitted for approval to the Arizona Department of Insurance. You will also recall that Mr. Humphrey, who is the Director of Insurance for the State of Arizona, recited from the Arizona Revised Statutes specifically Section 20-1110, which exempts the reservation of benefits form used in connection with these annuities from any approval requirement, if requested by the policyholder.

[continued on next page]

APPENDIX E-4
A142

INSTRUCTION AS GIVEN [cont'd]:

Therefore, if you were to conclude from the evidence presented that said reservation of benefits and proceeds rider was requested by the policyholder, then you are not to consider the fact, standing alone, that it was not submitted to the department for approval, as evidence of wrongdoing, in connection with your deliberation, but you may consider that fact again in the context of all other evidence in the case.

Even if you should conclude that the reservation of benefits and proceeds rider should have been submitted for approval, that fact, standing alone, would not constitute fraud but it may be considered by you in context with all the other evidence in the case.

R.T. O 336-337

APPENDIX E-4
(Page 2 of 2)

PROPOSED INSTRUCTION:

35

You must not infer, directly or indirectly, that there was any wrongdoing on the part of the defendant, Mr. Goldberg, merely because the Insurance Commissioner suspended Financial Security Life Insurance Co. from doing business between October 16, 1968 to November 29, 1969.

Devitt & Blackmar, Vol. 1, Section 11.05.

U. S. v. Rucker, 435 F.2d 950 (8th Cir. 1971).

Cf. Devitt & Blackmar, Vol. 1, Section 10.13.

C.T. 460

INSTRUCTION AS GIVEN:

You must not infer, directly or indirectly, that there was any wrongdoing on the part of the defendant merely because of the fact, standing alone, that the insurance commissioner suspended Financial Security Life Insurance Company from doing business.

R.T. O 338-339

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APPENDIX E-5

PROPOSED INSTRUCTION:

2

You must not infer, directly or indirectly, that there was any wrongdoing on the part of the defendant, Mr. Goldberg, merely because the Insurance Commissioner suspended Financial Security Life Insurance Co. from doing business on April 18, 1969. Further, you must not infer, directly or indirectly, any wrongdoing on the part of Mr. Goldberg by virtue of the fact that Financial Security Life went into liquidation in January, 1970.

Devitt & Blackmar, Vol. 1, Section 11.05.

U. S. v. Rucker, 435 F.2d 950 (8th Cir. 1971)

C.T. 421

INSTRUCTION AS GIVEN:

Further, you must not infer, directly or indirectly, any wrongdoing on the part of the defendant on trial, as charged in the indictment, by virtue of the fact, standing alone, that Financial Security Life went into liquidation in January 1970.

R.T. O 339

APPENDIX E-6

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. PHILIP J. GOLDBERG, Defendant.	No. CR-70-517-PHX. WPC AGREEMENT OF EDWIN S. NEWMAN

Pursuant to negotiations conducted by Ronald A. Lebowitz and Joseph Raymond Keilp, Assistant U. S. Attorneys, and Tom Galbraith, counsel for the defendant, I, Edwin S. Newman, do hereby agree:

1. To waive all Fifth Amendment rights that I may have in the above-styled cause, and give to the United States a complete statement under oath concerning those events which are the subject for prosecution in CR-70-517-Phx. WPC.

2. In the event that co-defendant, Philip J. Goldberg, elects to enter a plea of guilty to a felony as charged in the indictment in CR-70-517-Phx. WPC, Edwin S. Newman will enter a plea to two separate violations of Title 26, U.S.C., §7203, and the government will recommend probation.

3. In the event that co-defendant, Philip J. Goldberg proceeds to trial, resulting in a finding of guilty

Q 3

Appendix F

BEST COPY AVAILABLE

by way of a jury verdict in CR-70-517-Phx. WPC, the following events will occur.

(a) The government will sever Edwin S. Newman and Edwin S. Newman will testify as a witness for the United States, said testimony being in conformity with the statement having been given to the United States Attorney under oath before trial.

(b) Edwin S. Newman shall, after conviction of co-defendant Philip J. Goldberg, and upon the exercise of discretion to be held for all purposes by the office of the United States Attorney, enter a plea to one count of the indictment in CR-70-517-Phx. WPC, whereupon the United States shall recommend the disposition of probation as to Edwin S. Newman and shall dismiss all remaining counts in CR-70-517-Phx. WPC.

4. Furthermore, I, Edwin S. Newman, do expressly understand that in the event I fail to honor the terms of this agreement upon the conclusion of a trial of Philip J. Goldberg which results in a conviction, that the United States Attorney shall use my pretrial statement under oath as well as my testimony at the trial of Philip J. Goldberg against me in a subsequent trial in CR-70-517-Phx. WPC.

I do hereby certify that I have read, understood, and agree to follow the terms of this agreement.

EDWIN S. NEWMAN
Defendant

TOM CALDWELL
Attorney for Edwin S. Newman

WILLIAM C. SMITHERMAN
United States Attorney

RONALD A. LEBOWITZ
Assistant U. S. Attorney

JOSEPH J. KELP
Assistant U. S. Attorney

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

EDWIN S. NEWMAN, Defendant, TOM GALBRAITH, Attorney for Edwin S. Newman, RONALD A. LEBOWITZ, Assistant U. S. Attorney, and JOSEPH RAYMOND KEILP, Assistant U. S. Attorney, each being first duly sworn upon his oath deposes and says:

The signatures on the foregoing Agreement of Edwin S. Newman are true and valid.

DATED this 11th day of May, 1973.

EDWIN S. NEWMAN, Defendant

TOM GALBRAITH
Attorney for Edwin S. Newman

WILLIAM C. SMITHERMAN
United States Attorney

RONALD A. LEBOWITZ
Assistant U. S. Attorney

JOSEPH RAYMOND KEILP
Assistant U. S. Attorney

Subscribed and sworn to before me this 11th day of May, 1973.

Notary Public

My Commission Expires Jan. 11, 1974

Supreme Court, U. S.
FILED
AUG 13 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1975
CERTIORARI GRANTED JUNE 16, 1975

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

CR-70-517 PHX.
COPPLE

THE UNITED STATES

vs.

PHILIP J. GOLDBERG
EDWIN S. NEWMAN
EMIL TUCKER
WILLIAM MILES SKILLMAN and
ROBERT STANLEY CLARK

DATE	PROCEEDINGS
1970	
Oct. 15	1. File Indictment (17 cts)
Oct. 15	— Minute entry: It is ordered that a B/W be issued as to all defts and bonds set in the amt. of $10,000 respectively.
Oct. 15	— Issue B/W in dup. as to all defts to marshal.
Oct. 20	— Minute entry; Defts Goldberg and Newman having posted bonds, it is ordered that a summons be issued as to these two defts only returnable on 11/9/70 at 12:00 noon in ctrm #3.
Oct. 20	— Issue Summons as to defts. Goldberg and Newman only to marshal.
Oct. 21	— Minute entry: Deft. Emil Tucker having posted bond, it is ordered that a summons be issued as to said deft. returnable on 11/9/70 at 12:00 noon in ctrm #3.
Oct. 21	— Issue summons as to deft. Tucker to marshal.

DATE	PROCEEDINGS

1970

Oct. 23 — Minute entry: Deft. Wm. Skillman having posted bond, it is ordered that a summons be issued as to deft. Skillman returnable on 11/9/70 at 12:00 noon in ctrm #3.

Oct.23 — Issue summons to marshal in trip. re deft. Skillman.

Oct. 26 2. File appearance of atty James La Rossa (by Gerald Shargel) as atty for deft. Emil Tucker.

Oct. 26 — Minute entry: On for arraignment as to deft. Emil Tucker. J. Jenckes pres. for Govt. Deft. Tucker pres. in person and with counsel Gerald Shargel. Deft. arraigned and pleads not guilty to cts he is charged in in the Ind. Order pass for trial setting at a later date and deft. allowed 60 days to file any motions. Deft. to remain on present bond.

Oct. 30 3. File summons returned executed by certified mail as to Deft. Skillman.

Oct. 30 4. File summons returned executed as to deft. Newman.

Nov. 9 5. File appearance of Kenneth Simon as atty for deft. Skillman.

Nov. 9 6. File appearance of Eugene Trope as atty for deft. Goldberg.

Nov. 9 7. File application for limited admission of practice of atty Simon and ORDER thereon.

Nov. 9 — Minute entry: On for arraignment as to defts Goldberg, Newman and Skillman. J. Jenckes pres. for Govt. Deft. Goldberg pres and with counsel E. Trope. Deft. Skillman pres. and with counsel K. Simon. Deft. Newman pres and with counsel M. Ploscowe. Ea. deft. arraigned and pleads not guilty as charged. Order pass for trial setting at a later date and ea. counsel allowed to Feb. 1, 1971 to file any motions. Ea. deft. to remain on present bonds.

DATE	PROCEEDINGS

1970

Nov. 9 8. File Waiver of right to be present at all proceedings prior to trial by Deft. Emil Tucker.

Nov. 12 9. File application for limited admission of Eugene L. Trope and ORDER thereon.

Nov. 13 10. File Commissioner's record of proceedings as to deft. Wm. M. Skillman, from Western Dist. of Missouri at Kansas City, and $10,000 bond (10% cash posted).

Nov. 16 — Minute entry: On for arraignment as to deft. Robert Stanley Clark. T. Crowe pres. for Govt. Deft. Clark pres. in person and without counsel. Deft. states to the Court that he will obtain counsel. Order this case be con't for arraign. as to deft. Clark until 11/23/70 at 12:00 noon.

Nov. 16 11. File appearance of atty Henry Florence as counsel for Deft. Robert S. Clark.

Nov. 16 12. File Bail reform Act Form No. 1 as to deft. Clark.

Nov. 16 13. Enter and file order specifying methods and conditions of release as to deft. Robert Stanley Clark.

Nov. 23 — Minute entry: On for arraignment as to deft. Robert S. Clark. J. Jenckes pres. for Govt. Deft. Clark pres. and with counsel Henry Florence. Deft. arraigned and pleads not guilty to cts charged in the Indictment. Order pass for trial setting at a later date and counsel allowed to 2/1/70 to file any motions.

Dec. 10. 14. File B/W returned executed as to deft. Robert Stanley Clark.

Dec. 28 15. File Motion of deft. Emil Tucker for Discovery and Inspection, Bill of Particulars, set for hearing 1/11/71 at 11:00 a.m. in ctrm #3.

1971

Jan. 7 16. File Stipulation that deft Tucker's motions set for 1/11/71 are vacated.

DATE	PROCEEDINGS

1971

Jan. 22 17. File stip. for continuance re time of filing motions as to deft. Goldberg from 2/1/71 to 4/1/71 and ORDER thereon. (per phone conversation with J. Jenckes this date, as to all defts of record and Mr. Jenckes mailed copies of order of continuance to all counsel of record).

Jan. 27 18. File stip. that deft. Edwin S. Newman may have an extension of time within which to file any motions until 4/2/71, and ORDER thereon.

Feb. 16 19. File motion of Fred R. Esser to withdraw as counsel of record for deft. Wm. Miles Skillman, said motion set for hearing at 11:00 a.m. on 3/15/71 in ctrm #3.

Mar. 8 20. File return on B/W executed as to deft. Edwin S. Newman.

Mar. 15 — Minute entry: in chambers. Fred Esser pres. on behalf of deft. Skillman. no other appearances. Order motion to with draw as local counsel granted. (Mr. Simon notified in Missouri of ruling and also sent new form for limited admission and copy of local Rule #6).

Mar. 21 21. File Stip. for continuance on behalf of deft. Philip Goldberg and ORDER thereon allowing until May 1, 1971 to file any motions.

Mar. 30 — Minute entry: On for change of plea as to deft. Tucker. J. Jenckes pres. for Govt. Deft. Tucker pres. and with counsel G. Shargel. Deft. Tucker changes plea to guilty to ct 2. Deft. waives time for sentencing.

Mar. 30 22. Enter and file Judgment and Commitment as to deft Tucker: 5 yrs. impr. as to ct 2. It is further ordered that said sentence to commence on April 5, 1971 and to be served concurrently with sentence imposed in case No. 6573-CD, Los Angeles, Calif. It is further ordered that counts 1 and 3 thru 17 be dismissed and deft's bond be exonerated.

Mar. 30 — Issue cc to marshal and prob. and mailed a copy of Judgment to deft. Tucker's atty, to be forwarded to bonding company (of which this file has no record).

DATE	PROCEEDINGS

1971

Apr. 8 23. File motion of counsel, Henry Florence, for leave to withdraw as counsel for deft. Robert Stanley Clark, set for hearing 4/19/71 at 11:00 a.m.

Apr. 19 — Minute entry: On for hearing re motion of H. Florence to withdraw as counsel for Deft. Robert Stanley Clark. J. Jenckes pres. for Govt. H. Florence pres. on behalf of deft. Clark. Deft. Clark not present. It is ordered that this motion be vacated.

Apr. 23 24. File Judgment and Commitment returned executed as to deft. Emil Tucker.

Apr. 27 25. File stipulation for continuance on behalf of deft. Goldberg and ORDER thereon, allowing time to file motions be extended to Aug. 1, 1971.

May 13 26. File Motion of Govt. to vacate conditional release and issuance of a B/W as to deft. Clark and ORDER THEREON.

July 19 27. File motion of deft. Tucker for modification of sentence, set for hearing 7/16/71 at 10:00 a.m. in ctrm #3.

July 19 28. Enter and file order modifying sentence of deft. Emil Tucker to read: that said deft. be committed to the custody of the Attorney General for a max. period of 5 yrs pur. to 18:4208(a) (2).

July 19 — Copies of the foregoing order mailed to U.S. Atty, U.S. Marshal, Atty for deft. Tucker and probation office.

Sept. 1 29. File motion of Deft. Goldberg for transfer from the District for trial on ground of prejudice.

Sept. 1 30. File notice of motion, by deft. Goldberg, to inspect grand jury minutes, directing the production of certain papers and directing the service of a bill of particulars set for hearing at 11:00 a.m. on Oct. 11, 1971 in Ctrm #3.

DATE	PROCEEDINGS
1971	
Sept. 14	31. File motion to dismiss the indictment or in the alternative for severance set for hearing 10/18/71 at 11:00 a.m. in ctrm #3. (re Deft. Goldberg).
Sept. 14	32. File contentions of counsel in support of motions to dismiss Indictment, or transfer from the district, or in the alternative of severance and a separate trial. (re Deft. Goldberg)
Sept. 14	33. File affidavit in support of motion to dismiss indictment or in the alternative for severance and a separate trial of deft. Goldberg.
Oct. 6	— Minute entry: The Court today ordered that motions numbered 29, 30, 31 are to be heard on Nov. 15, 1971 at 11:00 a.m. (J. Jenckes, F. Esser and E. Trope notified).
Oct. 12	34. File motion of deft. Newman for severance of defts.
Oct. 12	35. File motion of Deft. Newman for production, copying and photographing.
Oct. 12	36. File motion of deft. Newman for inspection, copying and photographing.
Oct. 12	37. File motion of deft. Newman for a change of venue.
Oct. 19	38. File notice of hearing on deft Newman's motion for severance, change of venue and motion for inspection, copying & photographing set for hearing 11/15/71 at 11:00 a.m. in ctrm #3.
Nov. 4	39. File memorandum of law in support of motions on behalf of deft. Goldberg.
Nov. 10	40. File motion of Deft. Goldberg for inspection, copying and photographing.
Nov. 10	41. File Motion of deft. Goldberg for production, copying and photographing.

DATE	PROCEEDINGS
1971	
Nov. 11	42. File Govt's response to defts Goldberg's and Newman's various motions.
Nov. 15	— Minute entry: Motions nos. 29, 30, 31, 40, 41, 34, 35, 36, & 37 on for hearing. J. Jenckes pres. for Govt. Eugene Trope and Fred Esser pres. for Deft. Goldberg. Deft. Goldberg not present. T. Galbraith pres. on behalf of Deft. Newman. Deft. Newman not present. It is ordered that all motions are denied. A preliminary pre-trial conference to be held at a later date. (to be set by Court).
Dec. 17	43. Enter and file Order that on or before May 1, 1972 Govt will furnish to counsel for defts copies of all documentary evidence, etc. that counsel will meet with Court for pretrial conference at 2:00 p.m. on 5/15/72, etc. and further ordered that this case is set for trial with a jury commencing at 9:30 a.m. on 6/13/72 in ctrm #3.
Dec. 17	— Mailed copy of the foregoing order to U.S. Atty. Fred Esser, H. Florence, A. Schwartz, M. Ploscowe and Ronald Fischetti, J. Flynn, Eugene Trope, K. Simon.
1972	
Jan. 17	44. File certified copy of Order to Transfer Cash Bail as to Deft. Skillman, received from Clerk, U.S. Dist. Court, W. Dist. of Missouri, Kansas City, Missouri, together within Clerk's check #1,555 in sum of $1,000 representing 10% of $10,000 bond on Deft. SKILLMAN.
Jan. 17	— Deposit $1,000 in Reg. Fund as 10% of $10,000 bond of deft. Skillman (Doc. #10).
Feb. 17	45. File consent to transfer of case for plea and sentence under R.20 as to Deft. William Miles Skillman.
Feb. 18	46. Enter and file order to transfer deft Skillman's $1,000 cash bail.
Feb. 18	— Disburse $1,000 to Clerk, U.S. District Court, Western Dist. of Missouri, as transfer of deft. Skillman's 10% cash bail, Order of 2/18/72 ck #3,140.

DATE	PROCEEDINGS

1972

Feb. 18 — Mailed this day to Clerk, U.S. Dist. Court, Western Dist. of Missouri, under R.20 as to deft. Skillman, certified copy of the Indictment and order transferring deft's cash bail, originals of deft's bond, bail reform act No. check in amt. of $1,000.00 and deft's consent to transfer case for plea and sentence together with JS-3 card.

Feb. 23 47. File reporter's transcript of plea and sentencing proceedings held 3/30/71 as to deft. Emil Tucker. Certified copy.

Mar. 16 48a. Enter & file Order resetting case for Jury trial 7/11/72 @ 9:30. (counsel notified)

Apr. 5 48. Enter and file order that the pretrial conference set for 5/15/72 is vacated and reset for pretrial at 2:00 on 6/26/72.

Apr. 5 — Mailed copy of the foregoing order to U.S. Atty, E. Trope, J. Flynn and H. Florence.

Apr. 12 49. File substitution of attorneys, notice and consent to the substitution and that Philip J. Goldberg will represent himself.

Apr. 12 50. File motion for determination of counsel by Govt.

Apr. 12 51. Enter and file order that Govt's motion for determination of counsel will be heard on Apr. 24, 1972 at 12:00 noon in ctrm #3. (U.S. Atty mailed copies of the foregoing order to Eugene Trope and had one personally served on Philip Goldberg).

Apr. 24 — Minute entry: Motion of counsel to withdraw on for hearing. J. Jenckes pres. for Govt. Deft. Goldberg pres. and with counsel E. Trope and local counsel Fred Esser. Order counsel E. Trope and F. Esser allowed to withdraw and deft. Goldberg may proceed pro se.

May 9 52. File reporter's transcripts, USA vs. Emil Tucker, of plea and sentencing proceedings had on March 30, 1971 (original and two copies) See Docket #47.

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May 12 — Minute entry: Record on appeal in Civil 72-82 Phx. re Emil Tucker, petitioner vs. United States of America transmitted to 9th Cir., San Francisco, Calif. this date. (2255 appeal).

May 30 53. File substitution of attorneys and notice of appearance of Donald C. Smaltz as atty for deft. Philip Goldberg.

May 30 54. File waiver of deft Goldberg's presence under Rule 43.

June 5 55. File stipulation for continuance of pretrial conference and ORDER thereon.

June 5 56. Enter and file order that the pretrial conference scheduled for 6/26/72 is vacated and reset for Oct. 30, 1972 and that the trial prev. set for July 11, 1972 is reset for November 28, 1972.

June 5 — Mailed copy of the foregoing order to U.S. Atty, Donald S. Smaltz, John Flynn, and Henry Florence.

Oct. 6 57. File Appearance of Thomas H. Coleman, counsel for deft. Goldberg.

Oct. 6 — Minute entry: Hearing on return on subpoenas, etc. J. Jenckes pres. for Govt. Thomas H. Coleman present on behalf of deft. Coleman. Other attys present are Mr. Cavanagh, Mr. Hing, Mr. Weiner and Tom Galbraith. Upon agreement of counsel, it is ordered that subpoenas as to Mr. Herbert Finn, Mr. Romley, Mr. Shaw and Arizona Insurance Commission be quashed (these people have complied with said subpoenas). Oral motions of attys Cavanagh, Hing and Weiner to quash subpoenas are taken under advisement and said counsel to file supporting memo. as to said motions by the 13th of Oct., Mr. Coleman to reply by the 20th of Oct. and Cavanagh, Hing and Weiner to respond by the 25th of Oct. It is furtherordered that counsel for Govt. to file memo. by the 25th of Oct.

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Oct. 10	58. File motion of deft. Robert O. Hing to quash subpoena duces tecum and supporting memorandum.
Oct. 11	59. Enter and file memorandum to counsel in connection with the pending motions of attys Harry Cavanaugh, Robert Hing and Sid Weiner to quash Rule 17(c) subpoenas served by deft. Goldberg and the obligation of the Court to secure full, fair and expeditious trial of criminal matters attention of counsel is called to the case of United States v. Moore, 368 F.2d 990 (9th Cir. 1966). The Clerk will send copies of this memorandum to the three attys named above and to counsel of record in this case.
Oct. 11	— Notice mailed to counsel re above memo. and Order.
Oct. 13	60. File motion of Sidney B. Weiner to quash subpoena, etc.
Oct. 16	— Minute entry: On for determination of counsel as to deft. Clark. P. Whitehead pres. for Govt. Deft. Clark pres. and with counsel H. Florence. It is ordered that motion of H. Florence, filed on 4/8/71 (docket #23) to withdraw as counsel for deft. Clark is granted. Deft. Clark states to the Court that he is retaining Mr. David S. McCord of Dallas, Texas, as counsel. Order this matter be con't until 10/24/72 at 12:15 p.m.
Oct. 20	61. File memorandum of points and authorities in opposition to motions to quash subpoena decus tecum and affidavit of Philip J. Goldberg.
Oct. 20	62. File transcript of proceedings held 10/6/72.
Oct. 20	63. File motion for continuance of trial date, set for hearing at 12:15 p.m. on 11/3/72.
Oct. 24	— Minute entry: On for determination of counsel as to deft. Clark, T. Crowe pres. for Govt. no appearance of deft. or counsel. Order matter be con't until 10/30/72 at 12:00 noon.
Oct. 26	64. Enter and file order that the pretrial scheduled for 10/30/72 is vacated.

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Oct. 26	— Mailed copy of the foregoing order to U.S. Atty, T. Coleman, D. McCord and J. Flynn.
Oct. 30	65. File reply of Sidney Weiner to memo. of points and authorities in opposition to motion to quash subpoena duces tecum.
Oct. 30	— Minute entry: On for determination of counsel as to deft. Clark. J. Jenckes pres. for Govt. Deft. Clark pres. and with counsel David McCord. Atty McCord is advised of status of case and he confirmed that he is counsel of record for deft. Clark.
Nov. 1	66. File Deft. Goldberg's response in opposition to Govt's motion for continuance of trial.
Nov. 3	— Minute entry: Govt's motion for continuance of trial on for hearing. J. Jenckes pres. for Govt. D. Smaltz pres. on behalf of deft. Goldberg. Order motion granted and trial of 11/28/72 is vacated and reset for trial, with a jury, at 9:30 a.m. on 2/20/73 (about 4 weeks set aside).
Nov. 3	— Mailed copy of minute entry re the above to J. Jenckes, Donald Smaltz, J. Flynn, D. McCord, P. Goldberg and E. Newman.
Dec. 8	67. Enter and file Memo. and ORDER that Rule 17(c) subpoenas are quashed; at a time agreeable to counsel, but not later than 1/10/73, Sidney Weiner and Robert Hing will make available to counsel for deft. Goldberg all deft's files in their possession, etc.
Dec. 8	— Mailed cc re above order to J. Jenckes, Sidney Weiner, Robert Hing and counsel for deft. Goldberg.
Dec. 21	68. File motion to reduce amount of appearance bond as to deft. Clark.
Dec. 21	— Minute entry: On for bail review hearing. J. Jenckes pres. for Govt. Deft. Clark pres. and with counsel David McCord. Order bail reduced to $10,000 (from $50,000 set by Mag. is Florida) with a 10% deposit.

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Dec. 21 69. File Bail Reform Act Form No. 2 as to Deft. Robert Stanley Clark.

Dec. 21 70. File Appearance Bond for Robert Stanley Clark in amt. of $10,000.00. Deposit in Reg. Fund. $1,000.00, 10%, posted by Robert Stanley Clark.

Dec. 22 71. File record of proceedings held before the mag. as to Deft. Clark re bail.

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Jan. 3 — Minute entry: On for change of plea as to deft. Robert Stanley Clark. J. Jenckes pres. for Govt. Deft. Clark pres. and with counsel D. McCord. Deft. pleads guilty to ct 3. Order pass for sentencing until 3/12/73 at 12:30 pm. and for dismissal as to other remaining cts and further that the trial date as to this deft. is vacated.

Jan. 15 72. File application of deft. Goldberg for order to show cause re contempt of Sidney B. Weiner.

Jan. 15 73. File affidavit of Geo. Nazarian re contempt.

Jan. 15 74. Enter and file Order to show cause re contempt of Sidney B. Weiner

Jan. 15 75. File notice and motion to amend Court order, set for 1/22/73 at 11:00 a.m. (re Court's order of 12/8/72 to include Harry Cavanagh).

Jan. 15 — Copies of documents nos. 72, 73 and 74 delivered to marshal for service.

Jan. 18 76. File petition for writ of habeas corpus ad testificandum re deft. Skillman.

Jan. 18 77. Enter and file order for writ of issue re deft. Skillman.

Jan. 18 — Issue writ to marshal in dup.

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Jan. 22 — Minute entry: Motion to amend order of Dec. 8, 1972 to include Harry J. Cavanagh and Order to show cause re contempt of Sidney Weiner. J. Jenckes pres. for Govt. Geo. Nazarian pres. on behalf of deft. Goldberg, Harry Cavanagh pres. pro per. Order motion to amend order re Harry Cavanagh granted and Order to show cause re contempt of Sidney Weiner con't until 3:00 p.m. this date. Sub. at 3:00 p.m. present are Geo. Nazarian, Sheldon Mitchell and Sidney Weiner. Order contempt re Sidney Weiner be con't until 11:00 a.m. on 1/29/73.

Jan. 29 — Minute entry: Order to show cause re contempt of Sidney Weiner on for hearing, Geo. Nazarian pres. for Deft. Goldberg. T. Crowe pres. for Govt. No other appearances. Affidavit is now filed by Geo. Nazarian. It is ordered that a summons be issued, personally by marshal, to Sidney Weiner and a copy to be delivered to Sheldon Mitchell, to appear at 2:00 p.m. in ctrm #3 this date, re contempt hearing.

Jan. 29 — Issue summons to marshal in dup., plus one copy of Sheldon Mitchell, along with special instructions to the marshal.

Jan. 29 78. File affidavit of George Nazarian.

Jan. 29 79. File summons returned, executed by marshal, as to Sidney Weiner.

Jan. 29 80. File motion of Deft. Goldberg for continuance of trial date.

Jan. 29 — Minute entry: Continuation of 11:00 a.m. hearing this date. Sub., at 2:00 p.m. present are Geo. Nazarian, Sidney B. Weiner and Sheldon Mitchell. Witnesses, Sidney Weiner, Jack L. Helfinger and Geo. Nazarian sworn and exam. The Court advised Mr. Nazarian, that if deft. Goldberg wanted information from the files of Sidney Weiner, that he would have to pay the salary of clerical employment from Weiner's office, micro film documents for preservation of files, and costs to be borne by Mr. Goldberg in ad-

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vance. In re contempt of Sidney B. Weiner, it is ordered that this matter is held in abeyance at this time.

Jan. 29 81. Enter and file order that the trial set for 2/20/73 is vacated and the matter is reset for jury trial commencing at 9:30 a.m. on May 15, 1973.

Jan. 29 — Mailed cc re above order to U.S. Atty, Geo. Nazarian, J. Flynn, Defts. Goldberg and Newman.

Feb. 1 82. File respondent's proposed mechanics to facilitate inspection of documents (Sheldon Mitchel on behalf of Sidney Weiner).

Feb. 20 83. File motion to discharge and vacate order to show cause re contempt of Sidney B. Weiner (no oral argument requested).

Feb. 23 84. File Deft Goldberg's intention to file proposal re inspection of documents.

Feb. 28 — Minute entry: Per request of J. Jenckes, the Court today ordered that sentencing be con't until further notice as to deft. Robert Clark.

Feb. 28 — Issue cc re above minute entry to J. Jenckes, D. McCord and Deft. Clark.

Mar. 12 85. File notice of motion, and motion for leave to withdraw as counsel for deft. Goldberg. (this document to be sealed), set for hearing at 12:15 p.m. on 3/15/73. (counsel notified by phone re hearing time and date).

Mar. 13 86. File Govt's response to motion of Deft. Goldberg's counsel to withdraw and Attached order thereon requesting that deft. Goldberg attend hearing set for 12:15 p.m. on 3/15/73 re withdrawal of counsel (J. Jenckes called and advised Goldberg and atty Smaltz of this order).

Mar. 15 — Minute entry: Motion for leave to withdraw as counsel for deft. Goldberg, on for hearing. J. Jenckes pres. for Govt. Deft. Goldberg pres. and with counsel Donald Smaltz and Geo. Nazarian. Order motion denied and case

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will proceed to trial as scheduled. It is further ordered, that upon respresentation to the Court that deft. Goldberg is without sufficient funds to continue retaining said counsel, that attys Donald Smaltz and Geo. Nazarian are hereby appointed, under the criminal justice act, to continue their representation of deft. Goldberg.

Mar. 16 87. File reporter's transcript of hearing on motion for leave to withdraw as counsel for deft. Goldberg.

Apr. 17 88. File petition for writ of habeas corpus ad testificandum re deft. Skillman.

Apr. 17 89. Enter and file order for writ to issue re deft. Skillman.

Apr. 17 — Issue writ to marshal.

Apr. 30 90. File motion of Goldberg re hearing on present of unauthorized persons at Grand Jury proceedings, etc.

Apr. 30 91. Lodge order for hearing re presence of unauthorized persons at grand jury proceedings, production of witnesses and documents, set for hearing at 3:00 p.m. on 5/7/73 in ctrm #3.

Apr. 30 — cc re the above mailed to Geo. Nazarian and J. Jenckes.

May 7 — Minute entry: Hearing re presence of unauthorized persons at Grand Jury proceedings. Witnesses W. G. Trexler, Jr., D. C. Marshall, Millard Humphrey and J. Jenckes sworn and exam. Order motion re this hearing is denied and counsel for deft. Goldberg to file, by 5/11/73, any other motions and further that counsel file with the Court by 5/14/73 any proposed jury voir dire questions & during course of trial & as soon as possible counsel to file proposed jury instructions with the Court.

May 7 92. File financial affidavit pur. to CJA #23 as to deft. Goldberg and ordered sealed until further notice by the Court.

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May 9 93. File motion to dismiss the Indictment on behalf of deft. Newman.

May 9 94. File motion of deft. Newman for severance.

May 9 95. File notice of hearing motions of deft. Newman set for hearing at 11:00 a.m. on May 10, 1973.

May 10 96. File response to motion to sever and motion to dismiss the Indictment re deft. Newman.

May 10 — Minute entry: Hearing held on motion to dismiss re deft. Newman and motion for severance. R. Lebowitz pres. for Govt. T. Galbraith pres. for deft. Newman. Order both motions are denied.

May 11 97. File application for appointment of more than one counsel for deft Goldberg pur. to Criminal Justice Act.

May 11 98. LODGE order appointing counsel for deft. Goldberg under the Crim. Justice Act.

May 14 99. File deft. Goldberg's additional pretrial motions.

May 14 100. File reporter's transcript of proceedings held on May 7, 1973.

May 14 101. File Govt's trial brief.

May 14 102. File Deft. Goldberg's proposed voir dire questions to be asked the jury.

May 14 103. File letter dated May 11, 1973 to Judge Copple from George Nazarian.

May 14 104. Enter and file order appointing counsel for defendant Goldberg (Geo. Nazarian)

May 14 105. File Answer to Deft Goldberg's additional pretrial motions.

May 14 106. File appointment of Donald Smaltz as counsel for deft. Goldberg, Pur. to CJA

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May 15 — Minute entry: Motion for order compelling Govt to disclose all material in its possession, etc., Motion to compel Government to disclose any information re any evidence or leads, etc. including wiretapping, Renewal of motion to dismiss the Indictment, etc. (see Doc. #99). J. Jenckes and R. Lebowitz pres. for Govt. Defendant Goldberg pres. and with counsel Donald Smaltz. No other appearances. Jerry West, Special Agent, sworn and exam. re wire-tapping. In summary, the following orders were made: that counts 13, 15 and as to deft. Goldberg, are dismissed; motion to sever for trial re Goldberg and Newman is granted; motion to dismiss the Indictment denied; Govt. to produce copy of every document in its possession to be used in this case, all Jenckes Act Statements, etc by 5/16/73 and any documents that Govt. may acquire later on under Brady Rule during the course of the trial to deft. Goldberg; to give rap sheets, if any, on all witnesses that Govt. intends to call for trial to deft. Goldberg, plea bargaining re deft. Clark to be read to atty Smaltz from court reporter's tapes; Govt to furnish the Court a complete list of logs re wiretapping, all tapes, order from the Justice Department authorizing wiretapping, etc. re years 1968 thru 1973 and Court will check this in camera, as to deft. Goldberg. Govt. to furnish counsel for deft. Goldberg tapes of all Goldberg Conversations and to play said tapes for counsel to hear, etc. It is further ordered that trial date of May 15, 1973 is vacated and reset for trial with a jury at 9:30 a.m. on May 22, 1973 in ctrm #3. It is further ordered that all witnesses return on 5/22/73 at 9:30 a.m.

May 16 107. File agreement of Edwin S. Newman, (sealed)

May 16 108. File reporter's transcript of hearing held May 15, 1973 re motions (see doc. #99).

May 16 109. Enter and file Order re Justice Department's file, etc. and further ordered that this order, along with the file, is sealed by the Court and not to be opened by anyone, including the clerk's staff, except as necessary in trial pro-

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ceedings. (cc of order personally delivered to R. Lebowitz and D. Smaltz by F. Daudet).

May 17 110. File reporter's transcript of proceedings on change of plea of deft. Clark.

May 18 111. File motion of Deft. Goldberg for discovery and inspection, set for hearing at 10:00 a.m. on 5/21/73 in ctrm #3.

May 18 112. File motions by deft. Goldberg for modification of Court's order of May 15, 1973, Motion for supplemental order for additional documents re electronic surveillance and Motion for Further Order for disclosure of electronic surveillance re certain Government witnesses; set for hearing at 10:00 a.m. on 5/21/73 in ctrm #3.

May 21 — Minute entry: Motion for discovery and inspection, Motion for modification of Court's order of 5/15/73, Motion for supplemental order for additional documents re electronic surveillance and motion for further order for disclosure of electronic surveillance re certain government witnesses on for hearing. R. Lebowitz pres. for Govt. Deft. Goldberg pres. and with counsel D. Smaltz and G. Nazarian. Order motion for discovery and inspection granted as to part I and denied as to part II. Motion for modification of Court's order of 5/15/73 is granted and Govt. to turn over to Smaltz 1966 and 1967 surveillance. Motion for supplemental order for additional documents re electronic surveillance Denied. Motion for further order for disclosure of electronic surveillance re certain government witnesses denied. Court enters motion and Order thereon to suppress re any evidence against deft. Goldberg re any wiretap information or any leads arrived therefrom. Order Rule 16 motion by Govt. to be complied with, in good faith, and to be complied within 3 days by deft (to submit list and copies of their, deft's, exhibits). Motion of deft. under Rule 16 re statements that Goldberg made to FBI or any other agency (deft. exhibits A, B, C and D marked for

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I.D. re this motion) denied, but Govt. ordered to make routine inquiries re any agencies that interviewed Goldberg or any witnesses in this case. Order Govt. to give deft Goldberg list of witnesses in order that they will be called each day and to give the Court a list of names of witnesses that will be called. Order matters in certification be sealed. (document #113).

May 21 113. File certification.

May 21 114. File Defendant's response to Govt's motion for discovery.

May 22 115. File supplement to proposed voir dire questions to be asked the panel of jurors by deft.

May 22 — Minute entry: On for jury trial as to deft. Goldberg. R. Lebowitz and J. Keilp pres. for Govt. Deft. Goldberg pres. and with counsel D. Smaltz and G. Nazarian. A jury of 12 persons, plus 2 alternates, are sworn and empaneled to try this case. Enter proceedings of trial. At 4:10 p.m. Order recess until 9:30 a.m. on 5/23/73. Jury admonished.

May 22 — Minute entry: Prior to trial and in chambers, motion of Deft. Goldberg to prohibit Govt. from using a jury book is denied in all respects. Motion of Govt. to use charts in opening statements is denied.

May 22 116. File Jury List.

May 23 — Minute entry: On for con't jury trial. Jury, all counsel and deft. being present, further proceedings are held. Order counsel to get together and stipulate to as much as possible all exhibits that can be marked directly into evidence. At 2:55 p.m. order recess until 9:30 a.m. on 5/31/73. Jury admonished.

May 23 117. File authorization and ORDER thereon for daily transcripts.

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May 24 118. File representation and stipulation thereon for introduction of Govt's exhibits.

May 24 — Minute entry: At 9:30 a.m. this morning jury excused until 1:30 p.m. so that counsel may continue examining exhibits and making stipulations thereto.

May 24 119. File second representation and stipulation thereon for introduction of Government's exhibits.

May 24 — Minute entry: Motion to suppress on for hearing (12:00 noon). R. Lebowitz pres. for Govt. Deft. Goldberg pres. & with counsel D. Smaltz & G. Nazarian. Deft. Goldberg sworn and exam. Deft's exhibits, re this motion to suppress, admitted into evidence. Order motion to suppress is denied in all respects.

May 24 — Minute entry: Sub., at 1:30 p.m., jury, all counsel and deft. being present, jury is now excused and ordered to return at 9:30 a.m. on 5/25/73 in order that counsel may continue their work on exhibits and stipulations.

May 25 120. File third stipulation for introduction of Govt's exhibits.

May 25 121. File Fourth stipulation for introduction of Govt's exhibits.

May 25 122. File reporter's transcript of opening statement on May 22, 1973.

May 25 — Minute entry: Jury, all counsel and deft. Goldberg being present, further proceedings of trial are now held. At 3:55 p.m. order recess until 9:30 a.m. on May 29, 1973.

May 29 — Minute entry: On for further proceedings of trial. Jury, all counsel and Deft. Goldberg being present. Trial now held. At 4:35 p.m. order recess until 9:30 a.m. on 5/30/73. Jury admonished.

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May 30 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present. Trial now held. At 4:45 p.m. order recess until 9:30 a.m. on 5/31/73. Jury admonished.

May 31 — Minute entry: In absence of the jury, Deft's motion re Govt's witness list and seeing various files prior to trial are now heard. Deft's exhibit "A", re this motion marked for I.D. It is ordered that Govt to make good effort in supplying deft. with advance witness list and as soon as possible any files that are brought in by witnesses to be immediately given to deft. for access thereto. Jury, all counsel and deft. now being present, further proceedings of trial are now held. At 4:15 p.m. order recess until 9:30 a.m. on June 1, 1973. Jury admonished.

June 1 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present. Trial now held. At 4:45 p.m. order recess until 9:30 a.m. on Tuesday, June 5, 1973. Jury admonished.

June 4 123. File acknowledgement of receipt of items pur. to Court order of 5/15/73 by deft. Goldberg.

June 4 124. File reporter's transcript of proceedings held May 21, 1973.

June 5 125. File affidavit of indigency re deft. Goldberg and ORDER thereon, & ordered

June 5 — Minute entry: In absence of the jury, deft's motion re witness list (Govt. should supply list in advance) and motion not to call witness Skillman on 6/6/73 now argued. Order Govt. to give deft., 24 hrs in advance, notice of any changes in witness list and further Govt may call witness Skillman as scheduled. Jury, deft. and all counsel being present, further proceedings of trial are now held. At 4:40 p.m. order recess until 9:30 a.m. on 6/6/73. Jury admonished.

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June 6 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present. Trial now held. At 3:45 p.m. order recess until 9:30 a.m. on 6/7/73. Jury admonished. Order counsel to get together and go thru Skillman's files prior to Court on 6/7/73.

June 7 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present. Trial now held. At 4:40 p.m. order recess until 9:30 a.m. on 6/8/73. Jury admonished.

June 8 — Minute entry: On for further proceedings of trial. Jury, all counsel and deft. Goldberg being present, trial now held, in absence of the jury, It is ordered that at conclusion of Govt's case deft. to furnish copies of any documents from files of atty Finn to Govt. Order clerk to turn over files of atty Finn to deft. Goldberg for inspection. At 4:40 p.m. order recess until 9:30 a.m. on 6/12/73. Jury admonished.

June 11 126. File reporter's transcript of Govt's opening statement.

June 11 127. File Govt's proposed list of witnesses, as communicated to defense for week of June 11, 1973.

June 12 — Minute entry: On for further proceedings of jury trial. Deft. Goldberg, all counsel and jury being present, further proceedings are held. At 4:30 p.m. order recess until 9:30 a.m. on 6/13/73. Jury admonished.

June 13 128. File authorization for reporter's transcripts and ORDER thereon.

June 13 — Minute entry: On for further proceedings of jury trial. Deft. Goldberg, all counsel and jury being present, further proceedings are held. At 4:20 p.m. order recess until 9:00 a.m. on 6/14/73. Jury admonished.

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June 14 — Minute entry: On for further proceedings of jury trial. Deft. Goldberg, all counsel and jury being present, further proceedings are held. Deft's motion for mistrial is denied. At 4:15 p.m. order recess until 9:00 a.m. on 6/15/73. Jury admonished.

June 15 — Minute entry: On for further proceedings of jury trial. Deft. Goldberg, all counsel and jury being present, further proceedings are held. At 4:20 p.m. order recess until 9:00 a.m. on 6/19/73. Jury admonished.

June 19 129. File acknowledgment of receipt of FBI Reports by the deft. Goldberg.

June 19 130. File Govt's proposed list of witnesses, as communicated to deft. Goldberg, for week of June 18, 1973.

June 19 — Minute entry: On for further proceedings of jury trial. In absence of the jury, deft's motion re handwriting of Newman is now argued. Deft's exhibit "A" re this motion marked for I.D. Also deft's motion to strike testimony of witness Skillman relating to handwriting of Newman argued. It is ordered that motions are denied. Jury return into open Court and at this time alternate juror #1, Mary Blehm, replaces juror #12, Marlow Riggins. Enter proceedings of trial. At 3:55 p.m. order recess until 9:00 a.m. on Thursday, June 21, 1973. Jury admonished.

June 21 — Minute entry: On for further proceedings of jury trial. Jury, deft. Goldberg and all counsel being present, further proceedings are held. At 3:45 p.m. order recess until 9:00 a.m. on 6/22/73. Jury admonished.

June 22 — Minute entry: On for further proceedings of jury trial. Jury, deft. Goldberg and all counsel being present, further proceedings are held at 4:15 p.m. order recess until 9:00 a.m. on 6/26/73. Jury admonished.

June 25 131. File authorization for daily transcript and ORDER thereon.

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June 25 132. File letter from Department of Justice re electronic surveillance.

June 25 133. File affidavit of indigency re Goldberg & ordered sealed.

June 26 — Minute entry: On for further proceedings of jury trial. All counsel, Jury and deft. Goldberg being present, further proceedings are held. At 4:25 p.m. order recess until 9:00 a.m. on 6/27/73. Jury admonished.

June 27 134. File affidavit of indigency re Goldberg & ordered sealed.

June 27 — Minute entry: On for further proceedings of jury trial. Jury, all counsel and deft. being present further proceedings of trial are held. Deft's motion for Govt. to produce notes re interview of Newman argued. Deft's exhibit "A" marked for I.D. only. Order motion denied. It is further ordered that deft. to give list of names of their witnesses to Govt. Govt's exhibit #35 marked for I.D. only and ordered sealed. At 4:35 p.m. order recess until 9:00 a.m. on 6/28/73. Jury admonished.

June 28 — Minute entry: On for further proceedings of jury trial. Jury, all counsel and deft. being present further proceedings of trial are held. At 4:35 p.m. order recess until 9:00 a.m. on 6/29/73. Jury admonished.

June 29 — Minute entry: On for further proceedings of jury trial. Jury, all counsel and deft. being present further proceedings of trial are held. Govt rests. Jury excused until 1:30 p.m. on Monday, July 2, 1973. Arguments on deft's motion for acquittal to be heard at 9:00 a.m. on 7/2/73.

June 29 135. File reporter's notes of ex parte hearing in chambers on 6/29/73 and ORDERED sealed.

July 2 136. File deft Goldberg's renewal of motion re production of Newman's statements to counsel for Govt., pur. to Jencks Act and Brady; and motion for all files records,

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documents and communications, whether oral or written, between attys for Newman and any representative of the Govt. re plea agreement entered into between Newman and the United States.

July 2 137. File deft. Goldberg's motion re insufficiency of Govt. response re wiretaps on deft. between Jan. 1, 1966 thru date of trial.

July 2 — Minute entry: Hearing on arguments on motion to dismiss. R. Lebowitz pres. for Govt. Deft. Goldberg pres. and with counsel R. Smaltz. It is ordered that motion for Govt atty's notes is denied; Motion re wiretaping and surveillance is denied and motion to dismiss cts 1, 2, 4, 7, 10, 11, 12, 14 and 16 is taken under advisement. Order trial proceedings set for 1:30 p.m. be vacated & to resume at 9:00 a.m. on 7/3/73.

July 3 138. File list of count mailings per exhibit numbers and transactions.

July 3 139. File memorandum in support of admission of testimony of Donald Smaltz.

July 3 — Minute entry: On for further proceedings of trial. Jury, Deft. Goldberg and all counsel being present, deft presents his case. In absence of the jury, deft's motion that Govt. produce any evidence which may be favorable to the deft. Govt states to the Court that they have none. Jury being present further proceedings are held. At 2:25 p.m. order recess until 9:00 a.m. on 7/5/73. Jury admonished.

July 3 — Minute entry: Atty Smaltz's motion re in support of his own testimony is now heard. Atty Smaltz sworn and exam. Deft's exhibit "A" adm. re this hearing only. Ronald Lebowitz sworn and exam. Order motion is taken under advisement.

July 5 140. File response to motion for Judgment of acquittal of certain counts.

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July 5 141. File memorandum in opposition to permitting defense attorneys to testify.

July 5 142. Docket and file affidavit of indigency as to deft. Goldberg & ordered sealed.

July 5 — Minute entry: On for further proceedings of jury trial. In absence of the jury, atty's notes re Tager interview are ordered sealed and further ordered that no attys will testify in this case. Witness, atty Albert Swartz, states to the Court that he will not tesify on behalf of the deft. is Govt. is going to Indict him. Govt states to the Court that atty Swartz will not be indicted. Order Govt. to make inquiry if any surveillance has been conducted against atty Swartz and to present such evidence, if any, to the Court for in camera inspection. Jury being present, further proceedings are held. At 4:30 p.m. order recess until 9:00 a.m. on 7/6/73. Jury admonished.

July 6 — Minute entry: On for further proceedings of jury trial. Counsel, Deft. and jury being present, further proceedings are held. At 4:35 p.m. order recess until 1:30 p.m. on Monday, July 9, 1973. Jury admonished.

July 9 143. File defendant Goldberg's first set of proposed jury instructions.

July 9 — Minute entry: At 1:30 p.m. counsel and deft. Goldberg being present and in absence of the jury, it is ordered that deft's motion for judg. of acquittal of various counts of the Indictment is denied in all respects and order motion denied re IRS files of Goldberg re income tax for yrs 1966, 67 and 68 and ordered sealed for possible appeal purposes. Jury being present, further proceedings are held. At 4:45 p.m. order recess until 9:00 a.m. on 7/10/73. Jury admonished.

July 10 144. File stipulation re admissions of exhibits from Mr. Horridge's files.

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July 10 — Minute entry: On for further proceedings of trial. Deft., jury and all counsel being present further proceedings are held. At 4:35 a.m. order recess until 9:00 a.m. on 7/11/73. Jury admonished.

July 11 — Minute entry: On for further proceedings of trial, Jury, counsel and deft. being present, further proceedings are held. Deft's motion for mistrial and that the jury be discharged is denied. DEFT. RESTS. Govt's rebuttal is now heard. Edwin S. Newman, prev. sworn, resumes the witness stand. GOVT. Rests. At 4:30 p.m. jury excused and ordered to report back at 8:00 a.m. on Friday, July 13, 1973. Order counsel and deft. Goldberg to report back to Court at 10:00 a.m. on 7/12/73 for arguments on motions, etc.

July 12 145. File defendant Goldberg's second set of proposed jury instructions.

July 12 146. File Govt's requested jury instructions (as amended).

July 12 — Minute entry: Arguments on motions are now heard. Deft. Goldberg pres. and with counsel D. Smaltz. R. Lebowitz pres. for Govt. Upon agreement of counsel, it is ordered that exhibits, marked into evidence, be withdrawn as follows: 3G-01, 3G-02, 3G-03; 3K-07, 07, 09, 10 and 11; 3V-61 thru 67 and further that a certain page from exhibit 3-e (special meeting of board of directors of FSLIC, dated June 11, 1969) be withdrawn. Deft. renews motion for Judgment of Acquittal as to all counts and said motion is denied.

July 13 — Minute entry: Both sides having rested, arguments are now presented to the jury. Court instructs the jury and jury retire at 3:20 p.m., in charge of sworn bailiff, to consider of their verdicts. At 7:00 p.m. jury excused and admonished and ordered to return on Sat., July 14, 1973 at 9:00 a.m. to con't their deliberation. It is ordered

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that those exhibits not entered in evidence or marked for I.D. and not referred to be returned to the respective parties.

July 14 — Minute entry: At 9:00 a.m. jury being present and continue their deliberations. At 4:10 p.m. jury return into open Court and thru their foreman present the following verdicts: Guilty as to all cts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 & 16. Order jury discharged from further consideration of this case. It is further ordered that sentencing be tentively set for 9/10/73 at 12:30 p.m. and deft. Goldberg may remain on present bond. It is ordered that if deft. has a passport, he is to surrender it no later than Friday, 7/20/73 and if deft. has no passport, he is notify the Clerk of that fact. Deft. is further restricted to the same travel conditions as original imposed on his bond. Deft's motion for Judg. of acquittal and for new trial is denied.

July 14 147. File verdict: Guilty all cts charged in re deft. Goldberg.

July 16 148. File instructions to the Jury.

July 16 149. File reporter's transcripts of trial proceedings (29 volumes altogether).

July 16 150. File affidavit of indigency and ordered sealed.

July 25 151. File CJA Form 21 Authorizing Payment of Expenses for Services of Commercial Lender, Henry T. Willmuth. Ordered sealed.

July 25 152. File CJA Form 21 Authorizing Payment of Expenses for Services of SEC attorney, J. Joseph Kennedy. Ordered sealed.

July 30 — Minute entry: The Court today ordered that sentencing as to deft. Goldberg be con't from 9/10/73 to 9/17/73 at 12:30 p.m. (also deft. Clark will be sentenced that date).

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July 30 153. Docket and file affidavit of P. Goldberg (orig. filed on 7/23/73).

Sept. 4 — Minute entry: The Court today ordered that sentencing as to deft. Clark be con't from 9/17/73 until a later date.

Sept. 4 — Mailed cc re above minute entry to R. Lebowitz and D. McCord.

Sept. 14 154. File affidavit of Daniel Friedman with attached exhibits.

Sept. 17 — Minute entry: On for sentencing as to deft. Goldberg. R. Lebowitz pres. for Govt. Deft. Goldberg pres. and with counsel D. Smaltz. Order sentencing be con't until 10/5/73 at 12:15 p.m. It is further ordered that deft. may travel anywhere in the Continental United States, but not outside the U.S., so long as said travel is related to his employment, employment opportunities, or employment related activities.

Oct. 5 — Minute entry: On for sentencing as to deft. Philip J. Goldberg. R. Lebowitz pres. for Govt. Deft. Goldberg pres. and with counsel Donald Smaltz. Prior to sentencing a hearing is held in chambers in which certain exhibits are admitted and ordered sealed.

Oct. 5 155. Enter and file Judgment and Commitment as to deft. Goldberg: 2 yrs impr., to run concurrently as to cts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 16. It is further ordered that deft. pay a fine in the amt. of $1,000 on each of said counts making a total of $14,000,00. Deft. may remain on present release status pending appeal.

Oct. 5 — cc re above order re deft. Goldberg delivered to marshal, probation and Donald Smaltz and deft. Goldberg.

Oct. 5 156. File Deft's Goldberg Notice of Appeal. Copy sent to: US Atty, Probation, US Marshall, 9th CCA, Crt Reporter.

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Oct. 5 157. File Deft's Goldberg Designation of Record on Appeal. Copy to US Atty, 9th CCA Crt Reporter.

Oct. 30 158. File praecipe re to issue summons for deft. Clark to appear for sentencing on 11/12/73 in ctrm #3. (summons issued to marshal plus one to atty Mr. McCord).

Nov. 1 — Minute entry: On for further proceedings as to deft. Newman. R. Lebowitz pres. for Govt. Deft. Newman pres. and with counsel T. Galbraith. Order this matter be con't until 11/26/73 at 12:30 p.m. for further proceedings.

Nov. 6 — MINUTE ENTRY: Good cause appearing, it is ORDERED that time in which to docket the appeal in the 9th CCA is extended until January 3, 1974.

Nov. 12 — Minute entry: The Court today ordered that sentencing be con't, as to deft. Robert Stanley Clark, to 11/19/73 at 12:30 p.m.

Nov. 13 — Minute entry: By request of the probation office, the Court today ordered that sentencing as to deft. Newman be con't from 11/26/73 to 12/10/73 at 12:30 p.m. (counsel notified by phone).

Nov. 13 159. File summons returned executed as to deft. Robert Stanley Clark.

Nov. 19 — Minute entry: On for sentencing as to deft. Clark, T. Crowe pres. for Govt. Deft. Clark pres. & with counsel David McCord.

Nov. 19 160. Enter and file Judgment and Commitment as to deft. Clark: cmt. 3 yrs impr. provided that deft. spend 6 months in jail, execution of remainder of sentence of impr. is suspended & deft, placed on prob. for such period. It is further ordered that deft. pay a fine in the amt. of $1,000.00. Execution of sentence is suspended until 12:00 noon on Friday, Nov. 23, 1973, at which time deft. will surrender himself to the marshal and at that time bond will be exonerated. It is ordered that counts 1 and 4 thru 17 are dismissed.

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Nov. 19 Issue cc re above order to marshal and prob. office.

Nov. 21 161. File motion to extend time for commitment as to deft. Robert S. Clark.

Nov. 21 162. Enter and file order that time for commitment as to deft. Robert S. Clark may be extended from 11/23/73 at 12:00 noon until 12/7/73 at 12:00 noon, and the bond in this cause shall continue in force and effect until further orders of the Court.

Nov. 21 — Issue cc re above order to marshal.

Nov 21 — Minute entry: The Court today ordered that deft. Robert Stanley Clark shall surrender himself to the marshal, in Dallas, Texas, at 12:00 noon on 12/7/73.

Nov. 21 — Issue cc re above minute entry to marshal.

Nov. 23 163. File motion by deft, Goldberg for reduction of sentence.

Nov. 23 164. Enter and file order that deft Goldberg's motion for reduction of sentence is denied.

Nov. 23 — Mailed cc re above order to U.S. Atty and D, Smaltz.

Nov. 26 — Minute entry: Order further proceedings in this case as to deft. Newman be con't until 12/10/73 at 12:30 p.m.

Dec. 5 165. File application for reimbursement for advanced funds on behalf of Deft. Goldberg, and affidavit of Mrs. Goldberg.

Dec. 5 166. Enter and file order extending time for commitment as to deft. Clark from 12/7/73 to 1/4/74, at which time deft. Clark will surrender himself to the Marshal at Dallas, Texas. The bond shall remain in full force and effect until further orders of this Court.

Dec. 5 — Issue cc re above order to U.S. Marshal and atty McCord.

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Dec. 5 167. Enter and file order that the application for reimbursement for advanced funds on behalf of indigent deft. Goldberg is denied.

Dec. 5 — Mailed cc re above order to U.S. Atty and Donald Smaltz.

Dec. 10 168. File motion and stip. for con't of sentencing as to deft. Newman from 12/10/73 to 12/17/73 at 12:30 p.m. and ORDER thereon.

Dec. 10 — Mailed cc re above motion and stip, to U.S. Atty and T. Galbraith.

Dec. 17 — Minute entry: On for further proceedings as to deft. Newman, R. Lebowitz pres. for Govt. Deft. Newman pres. & with counsel T. Galbraith. Order of Govt., it is ordered that this case be dismissed, as to deft. Newman and his bond exonerated.

Dec. 17 — Issue notice of dismissal, re deft. Newman, to marshal.

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Jan. 2 169. File reporter's transcript of procedings, volumes A through O (Original and three copies)

[C.T. 1-18]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 70-517 PHX

VIO: 18 U.S.C. § 1341
(Use of Mails in Scheme to Defraud)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK, DEFENDANTS

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

1. That at all times hereinafter mentioned, Financial Security Life Insurance Company (hereinafter referred to as Financial Security) was a life insurance company organized under the laws of the State of Arizona and doing business in Phoenix and Scottsdale, Arizona.

2. That at any time hereinafter mentioned, PHILIP J. GOLDBERG was Chairman of the Board of Directors and President of Financial Security; EDWIN S. NEWMAN was Vice President and a Director of Financial Security; EMIL TUCKER referred purchasers of single premium annuity policies to Financial Security; WIL-

LIAM MILES SKILLMAN purchased and used Financial Security annuity policies and ROBERT STANLEY CLARK purchased and used Financial Security annuity policies.

3. That from on or about the 20th day of January, 1968, and continuing to on or about the 9th day of January, 1970, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK hereinafter referred to as "defendants" devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from persons, banks and other lending sources, including:

BANK OF DENVER, 1534 California Street, Denver, Colorado

BANK OF THE SOUTH, P. O. Box 1088, Gretna, Louisiana

EMPIRE BANK, 1800 South Glenstone, Springfield, Missouri

FIRST NATIONAL BANK, 201 Franklin Street, Clarksville, Tennessee

FIRST NATIONAL BANK OF MASON CITY, 5 North Federal, Mason City, Iowa

HALLWOOD CORPORATION, Rural Route 1, Springfield, Missouri

HAUBSTADT STATE BANK, 101 Main Street, Haubstadt, Indiana

RAY HYLAN, 3440 West Henrietta Road, Rochester, New York

KAW INVESTMENT COMPANY, 711 Truman Road, Kansas City, Missouri

LIBERTY NATIONAL BANK, 130 Montgomery Street, San Francisco, California

MEDICANA LEASING CORPORATION, 227 South 7th Street, Springfield, Illinois

MID-CONTINENT NATIONAL BANK, 4901 Main Street, Kansas City, Missouri

NATIONAL BANK OF NORTH AMERICA, 116 5th Avenue, New York City, New York

ROYAL NATIONAL BANK OF NEW YORK, 1212 Avenue of the Americas, New York City, New York

SECURITY STATE BANK, 12 East Wall Street, Fort Scott, Kansas

SOUTHWEST NATIONAL BANK, 320 North Stanton, El Paso, Texas

T & C ENTERPRISES, 227 South 7th Street, Springfield, Illinois

that could be induced to loan money and take as collateral to secure the repayment of such loans single premium annuity policies issued by Financial Security, well knowing at the time that the said pretenses, representations and promises, which are specifically described hereinafter, would be and were false and fraudulent when made, which scheme and artifice to defraud is set forth more fully below.

4. It was part of said scheme and artifice to defraud that Financial Security would operate an insurance business from Phoenix and Scottsdale, Arizona.

5. It was a further part of said scheme and artifice to defraud that the defendants would cause Financial Security (1) to issue single premium annuity policies to defendants PHILIP J. GOLDBERG, WILLIAM MILES SKILLMAN, ROBERT STANLEY CLARK and others, (2) to take from the purchasers of such policies interest bearing promissory notes in payment of premiums on the said annuity policies, and (3) to require the purchasers to pay in advance to Financial Security the interest due for one year on said promissory notes.

6. It was a further part of said scheme and artifice to defraud that the purchasers of single premium annuity policies issued by Financial Security were required to and did execute Reservation of Benefits and Proceeds riders, providing, in substance, that all proceeds and benefits

payable under the terms of said annuity policies would be reduced by the total amounts remaining due and unpaid on promissory notes given to Financial Security in payment of premiums on said annuity policies.

7. It was a further part of said scheme and artifice to defraud, and as intended by the defendants, that single premium annuity policies issued by Financial Security, on which annuity policies premiums had been paid with promissory notes and which were subject to Reservation of Benefits and Proceeds riders, would have no endorsements or notations on said policies, or attachments affixed to said policies, indicating that promissory notes had been accepted in payment of premium on said policies and that said policies were subject to Reservation of Benefits and Proceeds riders.

8. It was further part of said scheme and artifice to defraud that the defendants and others who obtained single premiums annuity policies issued by Financial Security, on which policies the premiums had been paid with promissory notes, and which policies were subject to Reservation of Benefits and Proceeds riders, would and did use and cause said annuity policies to be used to borrow money from persons, banks and other lending sources, by assigning said annuity policies to said persons, banks and other lending sources from which loans were obtained or sought, as collateral to secure the repayment of said loans; and that said assignments would be received, endorsed and recorded at the home office of Financial Security.

9. It was further part of said scheme and artifice to defraud that the defendants would and did make and cause to be made to persons, banks and other lending sources that made and considered making loans to be collateralized with single premium annuity policies issued by Financial Security the premiums for which annuity policies had been paid with promissory notes on which there were unpaid balances, and which annuity policies were subject to Reservation of Benefits and Proceeds riders, certain false and fraudulent pretenses, representations and promises, among which were the following:

(a) That premiums were paid in full on single premium annuity policies issued by Financial Security which were offered as collateral for loans;

(b) That there were no liens or encumbrances of record against single premium annuity policies issued by Financial Security which were offered as collateral for loans;

(c) That the face value shown on single premium annuity policies issued by Financial Security which were offered as collateral for loans, was the cash surrender value and would be paid by Financial Security to the designated annuitant or his assignee upon presentation after the due dates specified in said annuity policies;

whereas, in truth and in fact, as the defendants well knew at the time, the aforesaid pretenses, representations and promises were false and fraudulent when made, in that:

(a) No payments, except interest payements, had been made on the promissory notes accepted by Financial Security in payment of premiums on said annuity policies;

(b and c) Reservation of Benefits and Proceeds riders reducing amounts payable under the terms of said annuity policies by amounts remaining unpaid on promissory notes accepted in payment of premiums to which said single premium annuity policies were subject, in effect, reduced the cash values payable to annuitants and assignees to nothing and made said annuity policies worthless as collateral for loans.

10. It was a further part of said scheme and artifice to defraud that the defendants would and did withhold and conceal from and fail to disclose to lenders to whom the single premiums annuity policies issued by Financial Security were offered as collateral for loans, certain material facts, the disclosure of which was necessary in order that statements and representations made and caused to be made by the defendants, and by persons who offered

said annuity policies as collateral for loans, would not be misleading, false and fraudulent, including the following material facts:

(a) That promissory notes had been accepted by Financial Security in payment of premiums on said single premium annuity policies issued by Financial Security and offered as collateral for loans, and that baiances remained unpaid on said promissory notes;

(b) That the single premium annuity policies issued by Financial Security and offered to lenders as collateral for loans were subject to riders providing, in substance, that proceeds and benefits payable under the terms of said annuity policies would be reduced when presented for payment by the total amounts unpaid on promissory notes accepted in payment of premiums on said annuity policies.

11. It was further part of said scheme and artifice to defraud that when said single premium annuity policies, issued by Financial Security and accepted by lenders as collateral for loans, were presented to Financial Security for payment, or when payment of cash values of said annuity policies was requested by said lenders, the lenders would then be informed that no amounts were payable to the said lenders on said annuity policies because no payments had been made on promissory notes accepted by Financial Security in payment of premiums for said annuity policies and said annuity policies were subject to Reservation of Benefits and Proceeds riders providing, in substance, that any amounts payable under the terms of said policies would be reduced by the total amounts remaining unpaid on premium notes.

12. On or about May 29, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so the defendants PHILLIP J. GOLDBERG and EDWIN S. NEWMAN caused to be placed in an authorized depository for mail matter within the State and District of Arizona, a letter dated May 29,

1968, addressed to Royal National Bank of New York, 1212 Avenue of the Americas, New York, New York 10036, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT II

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about August 2, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, and EMIL TUCKER knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated July 31, 1968 addressed to Financial Security Life Insurance Company, 100 West Clarendon, Phoenix, Arizona, attention Mr. Philip Goldberg, President, in violation of Title 18 United States Code, Section 1341.

COUNT III

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about October 16, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated October 14, 1968, mailed by Mid-Continent National Bank, 4901 Main, Kansas City, Missouri 64112, addressed to Finan-

cial Security Life Insurance Company, Phoenix, Arizona, containing life insurance assignment questionnaires relating to single premium annuities Nos. 91032, 91033, 91034, 91035, and 91036 issued to Robert Stanley Clark, in violation of Title 18 United States Code, Section 1341.

COUNT IV

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 17, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter dated December 17, 1968, addressed to First National Bank of Mason City, Mason City Iowa, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT V

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 26, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter sent by Financial Security Life Insurance Company, addressed to Horridge Enterprises, Inc., 711-717 Truman Road, Kansas City, Missouri 64106, containing assignments of single premium annuities Nos. 91040 and 91042 issued to Robert Stanley Clark, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT VI

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 26, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter dated December 26, 1968, addressed to Horridge Enterprises, Inc., 711-717 Truman Road, Kansas City, Missouri 64106, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT VII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 31, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER,

WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter dated December 31, 1968, addressed to Mr. Bill Skillman, Suite 909, Ozark National Life Bldg., 906 Grand Avenue, Kansas City, Missouri 64106, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT VIII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about December 31, 1968, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within the State and District of Arizona, a letter dated December 31, 1968 addressed to Mr. Robert J. Stacy, Broadfield Road, Manlius, New York, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT IX

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about January 1, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WIL-

LIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter, within thhe State and District of Arizona, a letter dated December 31, 1968, addressed to Kaw Investment Corporation, P.O. Box 10130, Kansas City, Missouri 64111, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT X

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about January 2, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated December 31, 1968, mailed by Western General Corporation, 1125 First National Bank Building, Denver, Colorado 80202, addressed to Financial Security Life Insurance Company, 1100 Towne House Tower, Phoenix, Arizona, in violation of Title 18 United States Code, Section 1341.

COUNT XI

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about February 10, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J.

GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoneix, within the State and District of Arizona, according to the direction thereon, a letter dated February 7, 1969, mailed by National Bank of North America, 116 Fifth Avenue, New York, New York 10011, addressed to Financial Security Life Insurance Company, Phoenix, Arizona, in violation of Title 18 United States Code, Section 1341.

COUNT XII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about February 24, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK caused to be placed in an authorized depository to mail matter, within the State and District of Arizona, a letter dated February 24, 1969, addressed to Mr. Bill M. Skillman, American Mortgage Corp., 906 Grand Avenue, Kansas City, Missouri, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT XIII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about March 19, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises,

and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter within the State and District of Arizona, a letter dated March 19, 1969, addressed to Mr. Ernest Donnell, Jr., Box 234, Denham Springs, Louisiana, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT XIV

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about March 21, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK caused to be placed in an authorized depository for mail matter within the State and District of Arizona, a letter dated March 21, 1969, addressed to National Bank of North America, 116 Fifth Avenue, New York, New York 10011, to be sent and delivered by the Post Office Department of the United States according to the direction thereon, in violation of Title 18 United States Code, Section 1341.

COUNT XV

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about April 18, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false

and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK, knowingly caused to be deliveded by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated April 16, 1969, mailed by First National Bank of Clarksville, 201 Franklin Street, Clarksville, Tennessee, addressed to Financial Security Life Insurance Company, North Central Street, Phoenix, Arizona, in violation of Title 18 United States Code, Section 1341.

COUNT XVI

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about May 9, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants, PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated May 6, 1969, mailed by Royal National Bank of New York, 1212 Avenue of the Americas, New York, New York 10036, addressed to Financial Security Life Insurance Company, 1100 Towne House Tower, Phoenix, Arizona 85013, in violation of Title 18 United States Code, Section 1341.

COUNT XVII

1. The Grand Jury realleges all of the allegations in paragraphs 1 through 11 of Count I of this indictment, and further alleges:

2. On or about May 16, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud

and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and attempting to do so, the defendants PHILIP J. GOLDBERG, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN and ROBERT STANLEY CLARK knowingly caused to be delivered by mail at Phoenix, within the State and District of Arizona, according to the direction thereon, a letter dated May 14, 1969, mailed by First National Bank of Clarksville, 201 Franklin Street, Clarksville, Tennessee, addressed to Financial Security Life Insurance Company, Box 16168, Phoenix, Arizona 85013, in violation of Title 18 United States Code, Section 1341.

A TRUE BILL

/s/ [Illegible]
Foreman of the Grand Jury

RICHARD K. BURKE
United States Attorney

/s/ [Illegible]
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-70-517-PHX. WPC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP J. GOLDBERG, DEFENDANT

AGREEMENT OF EDWIN S. NEWMAN

Pursuant to negotiations conducted by Ronald A. Lebowitz and Joseph Raymond Keilp, Assistant U. S. Attorneys, and Tom Galbraith, counsel for the defendant, I, Edwin S. Newman, do hereby agree:

1. To waive all Fifth Amendment rights that I may have in the above-styled cause, and give to the United States a complete statement under oath concerning those events which are the subject for prosecution in CR-70-517-Phx. WPC.

2. In the event that co-defendant, Philip J. Goldberg, elects to enter a plea of guilty to a felony as charged in the indictment in CR-70-517-Phx. WPC, Edwin S. Newman will enter a plea to two separate violations of Title 26, U.S.C., § 7203, and the government will recommend probation.

3. In the event that co-defendant, Philip J. Goldberg proceeds to trial, resulting in a finding of guilty by way of a jury verdict in CR-70-517-Phx. WPC, the following events will occur.

(a) The government will sever Edwin S. Newman and Edwin S. Newman will testify as a witness for the United States, said testimony being in conformity with the statement having been given to the United States Attorney under oath before trial.

(b) Edwin S. Newman shall, after conviction of co-defendant Philip J. Goldberg, and upon the exercise of discretion to be held for all purposes by the office of the United States Attorney, enter a plea to one count of

the indictment in CR-70-517-Phx. WPC, whereupon the United States shall recommend the disposition of probation as to Edwin S. Newman and shall dismiss all remaining counts in CR-70-517-Phx. WPC.

4. Furthermore, I, Edwin S. Newman, do expressly understand that in the event I fail to honor the terms of this agreement upon the conclusion of a trial of Philip J. Goldberg which results in a conviction, that the United States Attorney shall use my pretrial statement under oath as well as my testimony at the trial of Philip J. Goldberg against me in a subsequent trial in CR-70-517-Phx. WPC.

I do hereby certify that I have read, understood, and agree to follow the terms of this agreement.

/s/ Edwin S. Newman
EDWIN S. NEWMAN
Defendant

/s/ Tom Galbraith
TOM GALBRAITH
Attorney for Edwin S. Newman
WILLIAM C. SMITHERMAN
United States Attorney

/s/ Ronald A. Lebowitz
RONALD A. LEBOWITZ
Assistant U. S. Attorney

/s/ J. R. Keilp
JOSEPH R. KEILP
Assistant U. S. Attorney

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

EDWIN S. NEWMAN, Defendant, TOM GALBRAITH, Attorney for Edwin S. Newman, RONALD A. LEBOWITZ, Assistant U. S. Attorney, and JOSEPH RAYMOND KEILP, Assistant U. S. Attorney, each being first duly sworn upon his oath deposes and says:

The signatures on the foregoing Agreement of Edwin S. Newman are true and valid.

DATED this 11th day of May, 1973.

/s/ Edwin S. Newman
EDWIN S. NEWMAN
Defendant

/s/ Tom Galbraith
TOM GALBRAITH
Attorney for Edwin S. Newman
WILLIAM C. SMITHERMAN
United States Attorney

/s/ Ronald A. Lebowitz
RONALD A. LEBOWITZ
Assistant U. S. Attorney

/s/ J. R. Keilp
JOSEPH RAYMOND KEILP
Assistant U. S. Attorney

Subscribed and sworn to before me this 11th day of May, 1973.

/s/ Shirley J. Wilson
Notary Public

My Commission Expires
Jan. 11, 1974

SWORN STATEMENT OF EDWIN S. NEWMAN, taken on the 11th day of May, 1973, at the Federal Building 230 North 1st Avenue, Phoenix, Arizona, County of Maricopa, at the hour of 2:00 o'clock p.m., in the presence of:

Mr. Ronald A. Lebowitz,
Assistant United States Attorney;

Mr. Joseph Keilp,
Assistant United States Attorney;

FLYNN, KIMERER, THINNES AND GALBRAITH,
by Mr. Tom Galbraith,
for Mr. Edwin S. Newman;

Mr. D.C. Marshall,
Postal Inspector;

Conrad R. Blain,
Court Reporter.

EDWIN S. NEWMAN,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

MR. LEBOWITZ: Let the record show that this is an interview between the Office of the United States Attorney in the District of Arizona, and Mr. Edwin S. Newman, which is taking place on May 11th, 1973, at 2:00 o'clock p.m.

Present are Mr. Doyle Marshall, Postal Inspector, Mr. Edwin S. Newman, Mr. Tom Galbraith, attorney for Mr. Newman, and Mr. Ronald Lebowitz and Joseph Keilp, Assistant United States Attorneys.

EXAMINATION

BY MR. LEBOWITZ:

Q. Mr. Newman, before I ask you any questions, are you aware of the fact that anything that you say at this time may be used against you in a court of law?

A. Yes.

Q. You are aware that under the Fifth Amendment to the Constitution you have a right to say nothing?

A. Yes.

Q. You are represented by counsel, and have you conferred with your counsel prior to today?

A. Yes.

Q. And do you understand these rights, and do you at this time wish to speak to the Government under oath?

A. Yes, I do.

Q. All right.

MR. GALBRAITH: For the record, we are waiving the Fifth Amendment privilege. Mr. Newman has conferred with me at length about this. It's done voluntarily and knowingly and pursuant to an agreement entered into with the Government this day, a copy of which will be filed with the United States District Court, District of Arizona. I don't think it's necessary to read the terms of it since the agreement itself will be on file.

MR. LEBOWITZ: That's correct. All right.

* * * *

MR. LEBOWITZ: For the record, the time is now 4:30. We have not exhausted all the transactions of which Mr. Newman can testify.

(Whereupon, a discussion was held off the record.)

MR. LEBOWITZ: We intend to continue this discussion off the record at a later time this weekend, and that there are individuals—particularly the transactions of Williams, Peters and Franklin, as well as the Goldberg transactions with Royal National Bank of New York, which will be explored at a further time.

And Mr. Newman has indicated to the Government that he has knowledge of those transactions and could give significant testimony at the time of trial, at which time we will present that.

* * * *

[C.T. 361-364]

GROSSMAN SMALTZ GRAVEN & PERRY
Attorneys at Law
One Wilshire Building - Suite 2420
Los Angeles, California 90017
Telephone (213) 680-9770
Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. 70-517 PHX

UNITED STATES OF AMERICA, PLAINTIFF

v.

PHILIP J. GOLDBERG, ET AL., DEFENDANTS

DEFENDANT'S RENEWAL OF MOTION RE PRODUCTION OF NEWMAN'S STATEMENTS TO COUNSEL FOR THE GOVERNMENT, PURSUANT TO JENCKS ACT AND BRADY; and

MOTION FOR ALL FILES, RECORDS, DOCUMENTS AND COMMUNICATIONS, WHETHER ORAL OR WRITTEN, BETWEEN ATTORNEYS FOR NEWMAN AND ANY REPRESENTATIVE OF THE GOVERNMENT RE PLEA AGREEMENT ENTERED INTO BETWEEN NEWMAN AND THE UNITED STATES

I

Defendant Philip J. Goldberg renews his motion for production of the notes taken by Assistant United States Attorneys Lebowitz and Keilp during their various conferences with Edwin S. Newman prior to the time he testified on direct examination.[1] This motion is based upon 18 U.S.C. 3500 (The Jencks Act) and the doctrine announced in *Brady v. Maryland* and cases subsequent thereto which have been set forth in a memorandum previously filed with this Court.

---

[1] Refers to conclusion of direct testimony.

18 U.S.C. 3500 provides in pertinent part:

"(a) In any criminal prosecution brought by the United States, no statement or report in the prossession of the United States which was made by a Government witness . . . to an agent of the Government shall be the subject of . . . discovery, or inspection until said witness has testified on direct examination . . .

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * *

"(e) The term "statement," as used in subsections (b), (c) and (d) . . . means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

There is nowhere in the verbiage of the Jencks Act a distinction between attorneys for the Government and investigative agents; *viz.*, F.B.I., postal, F.B.N., etc. It cannot be denied that an Assistant United States Attorney is an "agent of the Government." There being no distinction between the types of agents set forth in the Act, just because the agent who obtained the statement happened to be an attorney, the statement should not be any less compellable, upon an appropriate showing

that a written statement exists that was "adopted or approved by" the witness.

Since *Hickman v. Taylor*, 329 U.S. 495 (1947), a "work product" doctrine existed in the federal jurisdiction which can prohibit *in a civil case* an attorney from obtaining his adversary counsel's compilation of interviews, statements, memoranda, etc. However, even in civil cases, pursuant to Rule 26(b) (3) Civil Procedure, opposing counsel can obtain his adversary's work product. It is submitted that if Congress had intended the work product objection to apply in the type of situation at bar, it would have written it into the Jencks Act. There being no such recognition of that type of exception against discovery, it is in fact non-existent in federal criminal cases.

Even if the work product doctrine were stated to be applicable to attorneys' notes taken of witnesses' interviews, it is respectfully submitted that the same in the instant case should be compellable under the *Brady* doctrine. We have previously set forth at length in various memoranda filed with the Court an explanation of what we contend *Brady* requires, and respectfully refer the Court to the compilation of cases interpreting *Brady* which have been filed. Accordingly, it is respectfully submitted that the Court grant the motion of defendant previously made for the production of these notes.

In the event the Court does not order the production of the notes, it is respectfully requested that the Court at least order the notes to be produced for its *in camera* inspection, and then after inspection rule upon the defendant's request.

II

Pursuant to *Brady* v. *Maryland*, 273 U.S. 83 (1963), and the principles announced, recognized and articulated in *Giles* v. *Maryland*, 386 U.S. 66 (1967), and *Giglio* v. *U. S.*, 405 U.S. 150 (1972), defendant moves for production of all files, records, memoranda, correspondence, documents and evidence of conversations (whether oral or written) between attorneys for Edwin S. Newman and any representative of the United States relating,

directly or indirectly, to the plea agreement arrived at between Newman and the Government.

In Volume XXI of the transcript, pages 4244 through 4249, Newman was questioned extensively about offers of testimony made by him or his counsel wherein, in substance, the Government in essence rejected entering into plea negotiation, based upon the fact that Newman's testimony "wasn't strong enough" against Goldberg, and that thereafter, Newman changed his testimony to meet the demands of the Government. Newman essentially denied such occurrences.

To the extent that there is information in the Government's files and records which indicate to the contrary, or information—although not in the Government's files and records—by way of oral conversations not memorialized between Newman's counsel and/or Newman *and* any representative of the U. S. Government, including Mr. Jenckes, Mr. Lebowitz and any other government agent, that material ought to be produced forthwith. Certainly, it is in the nature of exculpatory or favorable evidence insofar as defendant Goldberg is concerned.

DATED: July 2, 1973.

Respectfully submitted,

DONALD C. SMALTZ
GEORGE NAZARIAN

By /s/ Donald C. Smaltz
DONALD C. SMALTZ
Attorneys for Defendant Goldberg

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* * * *

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4P	C407, C408	C407	C407		
5A thru 5F	B159, B168	B159, B168	B159, B168		
5H thru 5Z	B159, B168	B159, B168	B159, B168		
5AA	B159, B168	B159, B168	B159, B168		
5BB thru 5MM	B168	B168	B168		
6A	D252	D258	D258		
6B	D253	D258	D258		
6C thru 6F	D254	D258	D258		
6G	D262	D301	D302		
6H	D263, D314, D400	D401	D402		
6J	D265	D301	D303		
6J-1	D303, D420	D421	D421		
6K	D328, D424	D425	D425		
6L thru 6P	D267	D280	D280		
6Q	E9	E45		E45	E16
6T	E11				E16
6U	E12	E13	E13		
6X	D399	D401	D402		
6Y	E47	E47	E47		
7A	D295	D306	D306		
7B	E121	E122, E123	E124		
7C	E118	E119, E121	E119, E121		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
7D	E112	E113	E115		
7E	D298	D298	D298		
7F	D288	D290	D290		
7G	D292, E178, K43	K44	K44		
7H	D305	D307	D307		
7I	D305	D307	D307		
7J	D307	D315			D315
7K	D303	D304	D304		
7M	D281	D283	D284		
7N	D281	D283	D284		
7-O	E137	E138	E138		
7P	E135	E136	E137		
8A	E393	E394	E394		
8B	E396	E396	E396		
8E	E402	E403	E403		
8F	E398	E399	E399		
8G	E399	E400	E400		
9A	E394	E394	E394		
9B	E396	E396	E396		
9C	E300	E301	E301		
9D	E294	E295	E295		
9E thru 9I	E380	E380	E380		
10A	F241	F243	F244		
10B	F245	F245	F246		
10C-1(1) thru -1(3)	F376	F376	F376		
10C-2	F376	F376	F376		
10C-3	F305	F305	F305		
10C-4(1)	F305	F306	F306		
10C-4(2)	F307	F308	F308		
10C-4(3)	F311	F312	F312		
10C-4(4) thru -4(13)	F312	F313	F313		
10C-4(14)	F313	F314	F314		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
10C-5, 10C-6	F130	F148	F149		
10C-7 thru 10C-12	F301	F303	F304		
10D-1	D275	D276	D276		
10D-2, 10D-3	F378	F378	F378		
10D-4, 10D-5	F157	F157	F157		
10D-6	F161	F162	F165		
10D-7	D265, F125	F126	F126		
10D-8, 10D-9	F122	F124	F124		
10D-10	F379	F379	F379		
10D-11	F142	F142	F142		
10D-12A, 10D-12B	F143	F143	F143		
10D-13(1)	F225	F226	F227		
10D-13(2)	F225	F226	F227		
10D-14	F225	F226	F227		
10D-15	F226	F226	F226		
10D-16 thru 10D-21	F380	F380	F380		
10D-22(1)	F380	F380	F380		
10D-22(2)	F380	F380	F380		
10D-23(1)	F380	F380	F380		
10D-23(2)	F380	F380	F380		
10D-25	F381	F380	F380		
10D-29	D281	D283	D283		
10D-30	D281				
10D-31	D281	D283	D283		
10D-32	F392	F392	F392		
10D-33	F392	F393	F394		
10D-34 thru 10D-37	F395	F395	F396		
10D-38	F396	F396	F396		
10D-39	F396	F397	F397		
10E-2	F341	F342	F342		
10E-3	E301	E301	E301		
10E-4	J378	J380	J380		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
10E-5	E304	E304	E305		
10E-6	E303	E303	E303		
10E-7	B157, B165	B157, B165	B159, B165		
10E-8 thru 10E-10	F382	F382	F382		
10E-11	E284	E284	E284		
10E-12 thru 10E-15	E285	E285	E285		
10E-16	E286	E287	E288		
10F-1	F149	F150	F150		
10F-2, 10F-3	F151	F152	F152		
10F-4	F152	F153	F153		
10F-5	F151	F152	F152		
10F-6 thru 10F-9	F133	F133	F133		
10G-1	F282	F283	F283		
10G-2 thru 10G-4	F284	F285	F286		
10G-12	F382	F382	F382		
10G-13	F384	F384	F384		
10H-4(1) and -4(2)	I252				
10H-10	I265				
10H-12	I217	I218	I218		
10I-1 thru 10I-6	G362	G362	G362		
10I-7	G303	G303	G303		
10I-8	G303	G304	G304		
10I-9	G336	G338	G338		
10I-10	G362	G362	G362		
10I-11	G305	G305	G305		
10I-12	G362	G362	G362		
10I-13	G305	G306	G307		
10I-14	G362	G362	G362		
10I-15	G307	G307	G307		
10I-16	G362	G362	G362		
10I-17(1) and -17(2)	G307	G308	G308		
10I-18 thru 10I-22	G362	G362	G362		

Trial index—continued:

	Ident.	*Offered*	*Rec'd*	*Ref'd*	*W'drawn*
Gov't Ex's (cont'd):					
10I-23	G309	G309	G309		
10I-24	G309	G309	G309		
10I-25 thru 10I-28	G362	G362	G362		
10I-29	G366	G362	G362		
10I-30	G362	G362	G362		
10I-31	G361	G361	G361		
10I-32	G361	G362	G362		
10J-1	E443, E445	F3	F4		
10J-2	F9	F10		F11	
10J-3	F8	F9	F9		
10J-4	G74	G75	G75		
10J-4(1) thru -4(6)	F385	F385	F385		
10J-5	F208	F208	F209		
10J-6	F35	F36	F36		
10J-7 thru 10J-9	F386	F386	F386		
10J-10	F388	F388	F388		
10J-11 thru 10J-15	F211	F213	F214		
10J-16(1) & -16(2)	F389	F389	F389		
10J-17(1) thru -17(3)	F390	F390	F390		
10K-1	F172	F172	F172		
10K-2	F203	F204	F205		
10K-3, 10K-4	F204	F204	F205		
10K-5	F189	F190	F190		
10K-6 thru 10K-11	F176	F178, F181	F181		
10K-12	F185, F384	F385	F385		
10L	F25	F25	F25		
10M	F220	F221	F222		
10N	F205	F206	F206		
10-O	F185, F187	F185	F185		
10-O-1	F184	F185	F185		

Trial index—continued:

	Ident.	*Offered*	*Rec'd*	*Ref'd*	*W'drawn*
Gov't Ex's (cont'd):					
10-O-2	F186	F185	F185		
10P-3	H100	H100	H100		
10P-4	H99	H101	H101		
10P-5	H91	H92	H92		
10Q	H63	H64	H65		
10S	H66	H68	H69		
10T	H14	H16	H16		
11A	D39	D40	D40		
11D	D43	D44	D44		
11E	D47	D47	D48		
11G	D60	D60	D60		
12A	D22	D24	D24		
12D	D50	D51	D51		
12E	D194	D194	D194		
12F	D165	D167	D167		
12G	D171	D171	D171		
12H	D177	D176	D177		
12I	D179	D179	D179		
12K	D162	D162	D162		
12L	D49	D50	D50		
12N	K91	K92			K94
12P	B157, B165	B157, B165	B159, B165		
12Q	B157, B165	B157, B165	B159, B165		
12R	D182	D182	D182		
12S	D183	D184	D184		
13A	H295	H297	H297		
13C	H301	H301	H301		
13D	B157, B166	B157, B166	B159, B166		
13E thru 13G	H270	H271	H271		
13A	H270	H271	H271		
14B	H362	H362	H363		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
14C	H384	H384	H384		
14D	H354	H354	H354		
14E	H364	H365	H365		
14F	H369	H369	H369		
14G	H367	H367	H367		
14H	H372	H372	H372		
14I	H318	H318	H318		
14J	H344	H345	H345		
14K	H360	H361	H361		
14L	H384	H384	H385		
14M	H361	H383	H383		
14N	H385	H385	H385		
14-O	H355	H356	H356		
15C	H457	H458	H458		
15D	I21	I22	I22		
15E	H469	H469	H469		
15F	I13	I14	I15		
15G	I26				I28
15H	I27				I28
16C	H403	H404	H404		
16D	H407	H407	H407		
16E	H408	H409	H409		
16F	H412	H412	H412		
16G	H416	H416	H418		H424
16H	H420	H420			H424
16I	H426	H425	H425		
16J	H424				H424
16K	H422, H427	H425	H425		
16L	H424				H424
16M	H431	H431	H431		
18A thru 18D	F358	F359	F359		
18E	F359	F360	F360		

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	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
19A	E209	E209	E209		
19B	E211	E211	E212		
19C	E216	E217	E217		
19D	E206	E207	E207		
19E	E204	E205	E205		
19F	E204	E204	E204		
20A	E67	E68	E68		
20B	E62	E64	E64		
20C	E57	E58	E59		
20D	E59	E60	E60		
20E	E60	E61	E61		
23A	I124	I124	I125		
23B	I128	I128	I128		
23C	I133	I135	I135		
23D	H292	H293	H294		
23E	H292	H293	H294		
23F	I127	I129, I130			I130
23G	I127	I129, I130			I130
23H	B157, B166	B157, B166	B159, B166		
23L	I132	I133	I133		
23M	I54	I55	I55		
23N and 23-O	H271	H271	H271		
23P	I29, I53	I54	I54		
23Q	I29, I53	I54	I54		
23R	I138	I138	I139		
23S	I51	I52	I52		
23S-1	I52				
23T	I144	I145	I145		
23U	I142	I143	I143		

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	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
24A	C282	C282	C282		
24B	C284	C285	C285		
24C	C285	C287	C287		
24D	B157, B166	B157, B166	B159, B166		
24E	C327				C327
24F	B157, B166	B157, B166	B159, B166		
24G	C327				C327
24H	C327	C327	C327		
24I	C296	C297	C298		
24J	C302				
24J-1	B157, B166	B157, B166	B159, B166		
24K	C327				C327
24L	C302	C303	C303		
24N	C324	C326	C327		
24-O	C229, C284	C284	C284		
25A	C108	C110	C110		
25B	C106	C107	C108		
25C	C120	C120	C120		
25D	C106	C114	C114		
25E	C269, J198	J198	J198		
25F	C106	C134	C134		
25G thru 25P	C156	C157	C157		
25Q	C159	C159	C159		
25R	C159	C159	C159		
25S	C136	C137	C137		
25T	C166	C166	C166		
25U	C149	C149	C149		
25V	C118	C118	C119		
25W	C138	C140	C140		

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	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
25X	C139	C140	C140		
25Y	C269				
25Z	C140	C141	C142		
25AA	C157	C158	C158		
25BB thru 25DD	C269				
25EE	C145	C145		C146	
25FF	C146				C148
25GG thru 25KK	C269				
26A	I287	I288	I290		
26B	I286	I294	I294		
26C	I282	I284	I284		
26D thru 26F	I283	I284	I284		
26G, 26H	I302	I304	I304		
26I	I305	I307	I315		
26J	I317				
26K	I310	I311	I311		
27G	K96	K97	K97		
28B	J418				
30A	H241	H241	H241		
30B	H241	H241	H241		
30C	H243	H244	H244		
31A	I384				
31B, 31C	I408	I408	I409		
31E	B6, I383	I384	I384		
31F thru 31M	I383	I384	I384		
31N	I400	I401	I401		
31-O	I415	I415	I415		
31P	I398	I399	I399		
32A	J236	J236	J236		
32B	K114, M65	K115	K116		
33	A319	B2	B3		
33A thru 33C	A319	B2	B3		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Gov't Ex's (cont'd):					
34A	F269	F270	F270		
34B	F275	F270	F270		
34C	F318	F319	F319		
34D	F356	F356	F357		
34E	F352	F353	F353		
34F	G427	G427	G428		
34G	H9	H10	H11		
34H	H123	H124	H124		
36A thru 36D	M275, M279	M279	M279		
37A	M267	M269			
37B	M269				
37C	M271				
37D	M272				
37F	M274				
Defense Ex's:					
A1	B71	B72	B72		
A2	B72	B73	B74		
A3	B74	B81	B81		
A4	B81	B81	B81		
A5	B81	B81	B81		
A6	B81	B81	B81		
A7	B81				
B1	B195				
C1	C67	C67	C67		
D1	C218	C218	C219		
D3	C237	C238	C238		
D4	C244	C245	C245		
E1	C359	C359		C363	
E3	C341	C344	C348		
E4	C343	C344	C348		
E5	C344	C344	C348		
E6	C349	C350	C350		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Defense Ex's (Cont'd):					
E9	C365	C365	C365		
E11	C364	C364	C364		
E12	C352	C353		C354	
E13	C355	C355	C355		
E14	C338, C356	C358	C358		
E15	C339	C363	C363		
F1	C433				
G1	D193				D213
G2 thru G4	D193				
H1	E181	E181	E189		
H2	E185	E185	E186		
H3 thru H13	N332	N332	N332		
I2	E80	E80	E80		
I3	E84				
I5	E85	E85	E86		
I7	E87	E87	E87		
J1	E230, G377			E231	
J2	E233				
K2	G220	G222			
K3	H180	H180	H180		
K8	G324	G326	G326		
K11	G240	G241	G241		
K15	J395	J396	J397		
*L1	E370, F269				
*L2	F399	G211	G211		
*L3	G150				
M1	G116, H193	H193	H197	H194	

(*L1, L2 & L3 were, prior to page G167, erroneously referred to as K1, K2 & K3—Adjusted at page G167.)

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	Ident.	Offered	Rec'd	Ref'd	W'drawn
Defense Ex's (Cont'd):					
M2	G116, H193	H193	H197	H194	
M3	G120	G120	G123		
M4	G199	G199	G199		
M5	H200	H202	H202		
N1 thru N10	G284	G285	G285		
O-1 (Offer of proof page K278)	G310, J15, K271, L394	K273		K273	
O-2 (Offer of proof page K278)	G310, I249, J121, K271, L394	K273		K273	
O-3	H163	H166	H166		
O-4	H167				
O-5	H181	H182	H182		
O-6	H206				
O-7	H224	H225	H226		
P1	I155	I155	I157		
P2	I158	I157	I158		
P3	I336	I336	I336		
P4	J20	J23	J23		
P4-1	J21	J23	J23		
P5	J26	J25	J25		
Q1	K137, K271	K138, K273	K139	K273	
Q2	K159, K271	K273		K273	
Q3	K162	K162		K162	
Q5	K203	K204	K204		
Q6	K233	K234	K234		
Q7	K245, M60	K246, M61	M61		
Q8	K255	K255	K255		

Trial index—continued:

	Ident.	Offered	Rec'd	Ref'd	W'drawn
Defense Ex's (Cont'd):					
Q9	K258	K262	K262		
Q10	K258	K262	K262		
Q11	K289	K290	K290		
Q12	K291	K291	K291		
Q13	K294	K294	K294		
Q14, Q15	K294	K294	K295		
Q16	K317	K318	K326		
Q17	K366				
Q18	K368				
Q19	K371	K371	K372		
Q20	K375	K376	K376		
Q21	K380	K380	K380		
Q22	K380	K380	K380		
Q23	K388	K389	K389		
Q24	K396	K397	K397		
Q25	K421	K422	K422		
Q27	L39	L39	L40		
Q28	N447	N447	N447		
Q29-2	N451	N454	N455		
S1	L319	L320	L320		
T1	L362	L363	L363		
U9	N71	N71	N71		
U10	N72	N72	N72		
U12-1 & U12-2	N372	N372	N373		
U13	N72	N75	N75		
U14 thru U17	N72	N75	N75		
U24	N192	N193	N193		
U25	N188	N191	N192		
U26	M76	M76	M76		
U27	M130	M131	M131		
U28	M131	M132	M134		
U29	M136	M137	M137		
U30	M295	M296	M296		
U31	N80	N82	N84		

Trial index—continued:

	Ident.	*Offered*	*Rec'd*	*Ref'd*	*W'drawn*
Defense Ex's (Cont'd):					
U32	N91	N93	N93		
U32A	N95	N96	N96		
U33	N98	N98	N99		
U34	N101	N103	N103		
U35	N102	N103	N103		
U36	N104	N105	N105		
U37	N108	N108	N109		
U38	N111	N111	N111		
U39	N113	N114	N114		
U41	N120	N119	N119		
U42	N120	N119	N119		
U43	N123	N123, N129	N133	N123	
U44	N137	N137	N138		
U45	N141	N141	N142		
U46	N144	N144	N144		
U47	N150	N151	N151		
U48	N152	N155	N155		
U48A	N152	N155	N155		
U49	N74	N75	N76		
U50	N74	N75	N76		
U51	N163	N164	N164		
U52	N167	N167	N167		
U53	N205	N207	N207		
U54	N179	N182	N182		
U55 thru U58	N203	N205	N205		
U59, U60	N296	N297	N299		
U61	O-19	O-20		O-20	

(TRIAL INDEX CONCLUDED.)

(INDEX CONCLUDED.)

Excerpts of Reporter's Transcript

[K11-K14] Q. During that time, did you have occasion to review documents in this case?

A. Yes.

Q. Did you have occasion to contact counsel prior to this time?

A. Yes.

Q. And who was your counsel?

A. Mr. Tom Galbraith of the law firm of Flynn—

THE COURT: You will have to speak up, Mr. Newman.

A JUROR: Mr. Lebowitz, too.

THE COURT: You, too, Mr. Lebowitz.

MR. LEBOWITZ: I'm sorry.

Q. Again, let me repeat: Who was your counsel in this case?

A. My counsel is Tom Galbraith of the law firm of Flynn, Kimorer, Thinnes & Galbraith.

Q. Approximately how long have you been preparing, reviewing documents in this case for this trial?

MR. SMALTZ: Your Honor, in connection with what? In connection with testifying as a Government witness?

THE COURT: I think I know where he is getting at. Go ahead.

Q. BY MR. LEBOWITZ: Go ahead.

A. For better than two years.

Q. During this time, you have also had occasion to confer with the Government, have you not?

A. Yes, I have.

Q. Approximately how many times?

A. For a day or so in May and over the last ten days or so.

Q. Now, Mr. Newman, as a result of those contacts with the Government, did you have occasion to enter into an agreement with the Government concerning your testimony in this case as a Government witness?

A. Yes, I did.

Q. And was this agreement entered into with advice of counsel?

A. Yes, it was.

MR. SMALTZ: Your Honor, I object to the leading as well as to the relevancy of these questions.

THE COURT: Well, go ahead, Mr. Lebowitz. Quit leading the witness, but I think the questions are relevant.

Q. BY MR. LEBOWITZ: Mr. Newman, what, if any, agreement have you made with the Government regarding your testimony in this case as a witness?

MR. SMALTZ: I want to make an objection. If the agreement was reduced to writing, as I was informed it was, then the writing is the best evidence of the agreement and it's the place to start, and I would like to see it, because I haven't had an opportunity to see it yet.

THE COURT: The Government will produce it for you before you commence your cross-examination.

MR. LEBOWITZ: That is correct.

MR. SMALTZ: The problem is, it is still the best evidence. This witness is going to testify about it.

MR. LEBOWITZ: Your Honor, this is not going to be used as an item in evidence.

MR. SMALTZ: It is not?

THE COURT: Go ahead, Mr. Lebowitz.

Q. BY MR. LEBOWITZ: Mr. Newman, again I repeat, what, if any, agreement have you made with the Government regarding your testimony as a witness at this trial?

A. I agreed to waive my Fifth Amendment rights and to give the Government a sworn statement as to matters basic to the counts in the indictment.

The Government agreed to sever me from this trial, and I agreed to give testimony at this trial consistent with my sworn statement.

I further agreed that at the conclusion of this trial and at the discretion of the Government, I would enter a plea to one count in this indictment; that the U. S. Attorney's office would recommend probation and would dismiss the remaining counts in the indictment.

Q. Now, Mr. Newman—

MR. SMALTZ: Again, Your Honor—excuse me, I don't mean to be obstreperous, really, but I think I would move that agreement, if it was reduced to writing, be produced for me now, so I can examine it.

THE COURT: Do you have a copy of it now?

MR. LEBOWITZ: Your Honor, we will produce the agreement.

THE COURT: How about the recess?

MR. LEBOWITZ: At a recess, outside of the presence of the jury, for the defense to examine and to be used as cross-examination, if they choose.

THE COURT: You will give the defense a copy of the agreement during the recess.

MR. LEBOWITZ: That is correct.

THE COURT: Yes.

* * * *

[K182-K186] Q. Now, Mr. Newman, I think you testified that you made a—you entered into an agreement with the Government in connection with your testimony in this case, is that right?

A. Yes.

(Defendant's Exhibit Q3 marked for identification.)

Q. I show you a copy of this agreement (Handing exhibit to witness). Is that it?

A. Yes, sir, that is the agreement.

MR. SMALTZ: Your Honor, I move this be received in evidence. I would like to put it on the screen.

THE COURT: Come up.

AT THE BENCH, OUTSIDE THE HEARING OF THE JURY, ALL COUNSEL ATTENDING:

MR. LEBOWITZ: I object to this being admitted into evidence.

THE COURT: Why?

MR. LEBOWITZ: It was turned over—

THE COURT: It is offered for impeachment, solely.

MR. LEBOWITZ: That is correct, so what purpose does it serve?

MR. SMALTZ: It is not only for impeachment; it goes to the bias and prejudice of the witness against this defendant and the reason for him to give false testimony.

MR. KEILP: Why can't he question him about it?

MR. SMALTZ: The agreement is the best evidence.

THE COURT: Question him about it and you can

use it for impeachment, like you would a statement or something, but I am not going to admit it in evidence before the jury. You can go ahead and question him about it.

MR. SMALTZ: Could you tell me why, Your Honor?

THE COURT: Well, I think it is not evidence on the main case in this thing, one way or the other. It is for impeachment and it is only usable as impeachment, if he denies something or says something contrary to it. Otherwise, it doesn't impeach him. You can use it for cross-examination, and if he states something contrary to what is in there for impeachment purposes, you can bring it out, but it, by itself, I don't think that it is admissible in evidence in the case.

MR. SMALTZ: But it goes to the motive or reasons to lie and his bias and prejudice.

THE COURT: That has already been brought out, so question him about any part of it that goes to that.

MR. SMALTZ: Okay.

WITHIN THE HEARING OF THE JURY:

Q. BY MR. SMALTZ: This agreement was entered into between you and the Government on or about May 11th, 1973, is that correct?

A. Yes, sir.

Q. But prior to that time, you had had numerous discussions with Government counsel, had you not, about entering into this agreement?

A. I had not had such discussions.

Q. Through your counsel?

A. My counsel had had discussions.

Q. And you had met with Government agents, is that right?

A. Prior to this agreement?

Q. Yes, sir.

A. I met once prior to this agreement, with Government attorneys.

Q. When was that, sir? When was that?

A. Yes, I'm trying to recall, sir. I have a recollection of sometime in April.

Q. That the only time you recall meeting with Government attorneys?

A. That's correct.

Q. Didn't you meet with them again on May 11th?

A. Yes.

Q. So that's two times?

A. That's correct.

Q. All right. Now, when you first met with them in April, you made an offer to enter—to testify against Mr. Goldberg, did you not?

A. I made an offer with respect to myself in the trial.

Q. And at that time you were asked your version of certain events, is that correct?

A. No, not at that time I was not. If you are referring to the April Meeting, I sat through a meeting in which I didn't open my mouth.

Q. But your counsel spoke on your behalf?

A. My counsel discussed certain things with the U.S. attorneys.

Q. You were present, weren't you?

A. Yes.

Q. And he stated what you would be able to testify to in certain respects, did he not?

A. No, he did not, sir, that I recollect. Sir, there is a document which reflects mine and my attorney's point of view with reference to the offer that was made to the Government.

MR. SMALTZ: Your Honor, could I have the answer read? I missed part of it.

(Answer read.)

Q. BY MR. SMALTZ: Is that document something other than Q3?

A. Yes, sir.

Q. Does that document relate to past testimony that you had given or proposed testimony that you would give?

A. No, sir. It was an offer. It's a letter written by my attorney on my behalf.

Q. Did it set forth what you would be willing to testify to with regard to certain matters?

A. Sir, I don't mean to be facetious, but I say what

you have said several times on my direct examination. The document is its own best evidence.

THE COURT: Will you answer the question—would you answer the question as near as you can recall, if you can recall, what the contents were?

A. I do not recollect whether it contains that as part of the offer.

MR. SMALTZ: Your Honor, at this time I move the production of that. Certainly if it contains any evidence similar to that, it would be compellable under 18 U.S.C. 3500, and even if it doesn't, the witness here now states he is without any recollection and I'd like to see it because I think it has a reflection on his testimony on direct as well as cross.

THE COURT: Do you have a copy of it available?

MR. LEBOWITZ: Your Honor, I submit that that is a letter between counsel to our office. It's a—

THE COURT: That's why I wanted to look at it. Do you have it?

MR. LEBOWITZ: We don't have it up here. It's downstairs in our office somewheres.

THE COURT: We can take it up this afternoon or later.

Go ahead.

Q. BY MR. SMALTZ: Now, Mr. Newman, it's a fact, is it not, that after that April meeting the Government turned down your offer because you weren't willing to give them the testimony that they wanted; isn't that right?

A. No, sir, that was not the reason for their turning me down.

Q. It was not—

A. No.

Q What was the reason?

A. The reason, as best I can recollect, is that at that time they were uncertain as to what would be the advantages of my being tried separately from Mr. Goldberg.

Q. Didn't you speak with—did you ever speak directly with any one of the prosecutors here other than through your counsel.

A. At what point in time, sir?

Q. Any time prior to May 11, 1973, when you gave them this partial statement?

A. No, I did not.

Q Did you ever communicate through your counsel to the Government certain offers of what you would be willing to testify to—

MR. LEBOWITZ: I believe that's already—

Q. MR. SMALTZ: —as proposed testimony?

MR. LEBOWITZ: I believe this line of questioning has already been reviewed.

THE COURT: He may answer.

A. Would you repeat it, sir?

MR. SMALTZ: May we have it read back, please?

(Pending question read.)

THE COURT: This is prior to May 11th again?

Q. BY MR. SMALTZ: Yes, sir.

A. I only know, sir, what I communicated to my counsel. I do not know what he communicated to the Government. His communications with the Government were not in my presence.

Q. Would you answer the question?

THE COURT: He's already answered the question. He has already stated that he doesn't know what his counsel said to the U.S. Attorney because none of the conversations were in his presence.

Q. BY MR. SMALTZ: All right. Didn't your counsel call you and tell you in substance and effect that the Government wasn't prepared to go along with making any sort of deal with you because you hadn't come far enough in your testimony?

A. No, I don't recall such a call or such a statement by my counsel.

Q. Or anything approximately that?

A. No, sir.

Q. Now, in this agreement—

Your Honor, I'm going to pass that for the moment and come back to it after I see that letter, if I get a chance to see it.

THE COURT: Okay.

Q. BY MR. SMALTZ: Now, sir, as part of the agreement that you made with the Government, it was

provided that in the event that Philip J. Goldberg elects to enter a plea of guilty to a felony as charged in the indictment, Edwin S. Newman will enter a plea to two separate violations of Title 26 U.S.C. 7203 and the Government will recommend probation, is that right?

A. That's correct.

Q. 26 U.S.C. 7203 has nothing—is not involved in this indictment, is it?

A. That's correct.

Q. 26 U.S.C. 7203 is a federal statute relating to wilful failure to file returns, supply information or pay taxes under the Internal Revenue Code, is that right?

A. That's correct.

Q. Are you under investigation for failure to pay taxes?

A. Am I under investigation?

Q. Yes.

A. No, sir.

Q. Were you at any time?

A. No, sir.

Q. Is there any sort of information pending against you or indictment concerning your failure to pay taxes.

A. No, sir.

Q. Well, then, tell me why you would enter a plea of guilty to a misdemeanor that had to do with failure to pay taxes, file a return or supply information?

A. To the best of my recollection, there was a duty to file 1099 forms with reference to payments of over $600, which forms were not returned. This was in connection with Financial Security Life.

Q. And these forms were not filed, is that right?

A. That's correct.

Q. And that's the plea you were going to enter?

A. That's correct.

Q. Two misdemeanors?

A. That's correct.

Q. What's the difference between a misdemeanor and a felony, Mr. Newman?

MR. LEBOWITZ: Objection, Your Honor.

THE COURT: Objection is overruled.

A. As far as I can make out, a misdemeanor—anything that carries a sentence of a maximum of one year

and a fine of $1,000 is a misdemeanor, and anything over that is a felony.

Q. In connection with your indictment in this case, you were facing how many, 14 counts?

A. Yes.

Q. Or 15? Whatever it was.

A. Something like that.

Q. If you were found guilty on those counts, what would have been your maximum—the maximum amount of time you could have been in prison?

MR. LEBOWITZ: I am going to object to any further mention in this court of punishment.

THE COURT: It goes to the weight of the witness' testimony and it's a matter for the jury to judge.

He may answer.

A. Five years, and I'm not sure of the fine.

Q. $5,000 fine, is that right?

A. That's correct.

Q. So you were facing a maximum of 75 years, right?

MR. LEBOWITZ: 70, I believe.

A. 70, if it's 14.

Q. BY MR. SMALTZ: 70 or whatever it is, 14 times five.

A. Right.

Q. Now, this agreement further provided that in the event the co-defendant, Philip J. Goldberg, proceeds to trial resulting in a finding of guilty by way of jury verdict, the following will occur:

First, the Government will sever Newman and Newman will testify as a witness for the United States, said testimony being in conformity with a statement having been given to the United States Attorney under oath before trial, is that correct?

A. That's correct.

Q. How many statements did you give the Government?

A. I gave them the one sworn statement of May 11th.

Q. And that's this statement in this booklet, is that right?

A. That's correct.

Q. That statement was only some 89 pages, is that correct?

A. Yes, sir.

Q. Your trial testimony here has been considerably—covered much more ground than what you made in your statement, is that correct?

A. That's correct.

Q. This statement that we—Mr. Lebowitz speaking, "We intend to continue this discussion off the record at a later time this weekend."

Did you, after May 11, continue a discussion at a later time off the record after May 11?

A. Yes, I believe that there was some discussion on May the 12th.

Q. What day was that?

A. Was that a Saturday?

Q. All right. I take it you were here in Phoenix—

A. Yes.

Q. —on May 11 and May 12. When did you come to Phoenix?

A. I believe I came on May 11.

Q. So you met with the Government representatives on May 12, is that right?

A. You mean subsequent to May 11th?

Q. Yes, May 12th is subsequent—

A. Is May 12th a Saturday?

Q. May 12th is a Saturday.

A. Yes, I met with the Government on May 12th.

Q. And did you discuss what your testimony would be here?

A. Yes.

Q. Who did you discuss it with?

A. Mr. Lebowitz, Mr. Keilp.

Q. And did they take notes or jot down anything at all of what you were saying?

A. Yes.

Q. There wasn't a reporter present?

A. No.

Q. And as they took notes, did they sometimes question you about what you had just said to make sure that they got it down correctly?

A. They may have. I don't really remember that that was part of the pattern.

Q. All right. You talked with them on May 12th. Did you speak with them at any other time between then and now?

A. Well, I have—I have been here in Phoenix since Saturday—a week ago this past Saturday. Can you give me a date, sir?

Q. You can't recall?

A. Well, let me calculate it out. This past Saturday was the 23rd, so it would be the 16th of June.

Q. When did you leave Phoenix after your chat on the 12th of May?

A. I recollect that I left on a Sunday.

Q. That would have been Sunday, May 13th?

A. I believe so.

Q. You did not come back again until, was it, June 16th?

A. No. I believe there was one additional weekend between the weekend of May 12th and the weekend of June 16th.

Q. What weekend was that, sir?

A. Excuse me, sir. Can I—can I retrace?

My recollection is that first meeting in May, that I did not meet with them on Saturday, May 12th, because I flew to Dayton, Ohio, on May 12th for a speaking engagement at a convention in Ohio, and my recollection is that I flew back to Phoenix that Saturday night and met with the Government attorneys on Sunday, May 13.

Q. All right. You met with them on May 11 and May 13?

A. That's correct.

Q. When was the next time you met with them?

Is it difficult for you to recollect this, Mr. Newman?

A. No. I just want to keep it in proper sequence. I believe the weekend of June 9th and 10th I was also here at Phoenix.

Q. June 9th and 10th being a Saturday and Sunday?

A. That's correct.

Q. Who did you meet with in the Government's office?

A. Mr. Lebowitz and Mr. Keilp.
Q. Did you discuss your testimony?
A. With Mr. Lebowitz and Mr. Keilp?
Q. Yes.
A. Yes.
Q. Was a reporter there?
A. No.
Q. As you were explaining—or discussing your testimony, did anyone take notes?
A. The two gentlemen took notes.
Q. Were they occasionally read back to you to see whether or not they correctly understood what you were saying?
A. Probably from time to time.
Q. All right, sir. Did you either correct them or say, "Yes, that's right," or "No, that's not right because it went this way, I believe," words to that effect?
A. Yes, that would happen.
Q. Did you go back to—did you leave Phoenix on the 10th?
A. Yes. My recollection is that I—I'm not sure that I left on the 10th. I think I left on the 11th or the 12th.
Q. You met with them on the 9th, a Saturday. You met with them on the 10th, Sunday. Did you meet with them on the 11th?
A. If I'm correct that I was here on the 11th, yes, I met with them on the 11th.
Q. Did you meet with them on the 11th? Mondays have not been a court day thus far.
A. Yes, I did meet with them on the 11th.
Q. Same procedure, you talked with them, they write down what you are saying?
A. Yes.
Q. When did you leave Phoenix?
A. I believe I left on the 12th.
Q. Did you meet with them on the 12th?
A. I don't recollect meeting with them on the 12th.
Q. Where were you on the 12th?
A. I think I was flying back to New York on the 12th.
Q. Do you recall what time of day you left?

A. No. Wait a minute, wait a minute. I'm wrong again, I'm wrong again. I'm sorry. I was in San Diego on Monday, the 11th, and I was in San Francisco on Tuesday, the 12th, and I—
THE COURT: Are you talking about May of '73?
THE WITNESS: No, I'm talking about June, sir.
THE COURT: Very well.
THE WITNESS: And I flew back to New York from San Francisco, so I was here only the Saturday and the Sunday, Saturday the 9th and Sunday the 10th.
Q. BY MR. SMALTZ: When was the next time you came back to Phoenix?
A. Saturday the 16th.
Q. Did you meet with the Government representative?
A. Yes.
Q. Same procedure?
A. Yes.
Q. Same questions, answers, read-backs, notes, whole bit?
A. Yes, sir.
Q. How long were you in conference with the Government representative on the 16th?
A. Well, I have a recollection of arriving at the Federal Building a little after 1:00 o'clock. I think we met until 5 or 6.
Q. How long on the 17th?
A. From about 11 to 5 or so.
Q. When was the next time that you met with Government representatives after the 17th?
A. I have met with them during portions of each day since.
Q. Did they go over your proposed testimony with you?
A. Pardon me?
Q. Did they go over your proposed testimony with you?
MR. LEBOWITZ: Objection to the "closed testimony."
MR. SMALTZ: I said "proposed."
Q. Did they?
A. Yes, they went over my testimony with me.
MR. SMALTZ: Your Honor, at this time, under 3500, I move for the—

THE COURT: Aren't these attorney's work product, notes of interviews with witnesses, just like yours are? Denied.

MR. SMALTZ: Your Honor, just a minute. May I make a statement?

THE COURT: We will take a recess at this time, ladies and gentlemen. You may be excused until you are called by the baliff to return.

(Jury withdraws from the courtroom.)

THE COURT: Isn't this attorney's work product, preparation—

MR. SMALTZ: No, sir.

THE COURT: —of a case, that is exempt from discovery?

MR. SMALTZ: But, Your Honor, it's been a long time since I argued a Jencks Act matter, but I recall cases. Whether or not I can put my finger on them, on an incident—

THE COURT: Until you put your finger on one that goes directly to this issue, the motion is denied, pending reopening if you can get me some authority for use of attorney's work product in interviewing a witness, with his impressions, plans, his strategy and the witness' testimony, when you have already got reduced to testimony a statement of the witness, that this attorney's notes in preparation for trial should be discoverable.

MR. SMALTZ: Okay, then, in support of my motion, first of all, may I say this: I know we are all anxious to break, particularly me, but in the first instance, this statement is incomplete of the witness, this statement dated May 11th.

THE COURT: I don't know that it is.

MR. SMALTZ: All right. I want to have it marked as an exhibit for identification in connection with this motion, and I read from here the remarks of the prosecutor who stated it was his specific intention to complete—to follow through an examination of this witness but on an off-the-record basis.

Now, when you have that situation where you start with and you have the attorney reading back the notes

to the witness, to see if they are correct or not, Your Honor, I believe the Jencks Act comes into play, but I will try and find a case.

THE COURT: You find a case and we will take it up then.

MR. SMALTZ: In the meantime, may this be marked as Exhibit 1A?

THE COURT: You may have it marked, because you are going to be using it for impeachment. It may be marked as an exhibit.

THE REPORTER: Is that Exhibit 1A?

THE CLERK: It is motion exhibit A.

(Defendant's Motion Exhibit A marked for identification.

(Recess.

(Further proceedings in open court, in the presence of the full jury, one alternate, the defendant and all counsel:)

Q. BY MR. SMALTZ: Now, sir, as part of that offer that you—the deal that you made with the Government, Mr. Newman, it was provided, was it not, that Edwin S. Newman shall, after conviction of the codefendant, Philip J. Goldberg and upon the exercise of discretion to be held for all purposes by the office of the United States Attorney, enter a plea to one count of the indictment, whereupon the U.S. shall recommend disposition of probation as to Edwin S. Newman and shall dismiss all remaining counts in the indictment, is that correct?

A. Yes, sir.

Q. So, essentially you are going to enter a plea to one count, is that right?

A. That is correct.

Q. However, in the event the Government is so disposed, they will still let you plead to a misdemeanor?

A. There was no—not one scintilla of indication of any such exercise of discretion on the Government's part.

Q. But that is what you are hoping for, isn't it?

A. I'm hopeful but I have no basis for that hope.

Q. Now, the problem is, if you are convicted of a felony, the New York State Bar will commence proceedings against you to revoke your certificate to practice law in New York; that is a fact, is it not?

A. That is correct.

Q. And that certificate to practice law is of paramount interest to you, is that correct?

A. Yes.

Q. And did you discuss with either your counsel or with either of the prosecutors your ability to enter a plea of nolo contendere to that one count of the indictment?

A. I don't believe that was discussed, sir. I believe it was specifically stipulated as a plea of guilty.

Q. Although the agreement doesn't say what type of plea, isn't that a fact?

A. My understanding was that it was a plea of guilty that would be expected of me.

Q. Did you ever discuss with your counsel the possibility of entering a plea of nolo contendere?

A. Not in the context of the May 11th agreement. We had talked about it months before, between ourselves.

Q. What is the difference between a nolo contendere plea and a plea of guilty so far as state bar proceedings are concerned?

A. I wasn't aware that there was any difference.

Q. Isn't it a fact a nolo plea, the state bar can't use your plea against you; that a guilty plea, they can?

A. I repeat, sir, as far as I know, there is no difference.

MR. SMALTZ: Can I have that answer read back?

(Last answer read.)

Q. You don't know the difference between a nolo plea and a plea of guilty?

A. I know the difference, sir, but I don't believe that the implications in terms of disbarment are any different if it is one plea or the other.

* * * *

[K240-K242] MR. SMALTZ: Thank you very much (handing folder to clerk).

Now, getting back to the Jencks Act, which we started talking about yesterday afternoon, Your Honor, the objection that has been raised by the Court has been that the materials constitute attorney's work product.

I don't know how your Honor could make that observation unless you personally inspect whatever documents or notes the Government counsel have in their possession. Now—

THE COURT: These are notes made by a trial attorney in preparation for trial and interviewing a witness, aren't they? Is there any question about that?

MR. SMALTZ: That is as I understand it.

THE COURT: Okay.

MR. SMALTZ: But, Your Honor, the work-product objection, and I do not mean to kick this point to death, but the work-product objection in the civil rules even gives way when there is no other way for the particular evidence to be obtained and it is pertinent to the subject matter under inquiry.

Now, I have not found a case, Your Honor, that said attorney's notes are compellable. I did read Wright and Moore, Federal Practice, this morning at about 2:30, and I note they have a whole section in there and I didn't find any cases that said attorney's work product—or notes taken by an attorney are not compellable. It seems to me—

THE COURT: The question isn't whether they are compellable; the question is are they compellable. Did you find a case that says they are compellable?

MR. SMALTZ: No, sir, but I didn't find one that says they are not. And the Jencks Act—

THE COURT: Tell you what you do, Mr. Smaltz. We are going to go ahead with the jury trial this morning and we are going to be here at least, from what you have both told me, another ten days, and over the weekend you can prepare whatever kind of a memorandum you want to give me on Monday that the Government can respond to Monday afternoon, and I will take a look at it and let's go on with the jury trial this morning.

MR. SMALTZ: Well, all right, but one other—Okay, I'm happy to do that, Your Honor, except would you, at least, consider ordering the Government to make available for your in camera inspection their notes?

THE COURT: I will order the Government to get their notes together and have them available in case an order is made, and I will see your memorandum first.

MR. SMALTZ: All right, sir, thank you. I am ready to go.

(The full jury and one alternate were returned to the courtroom.)

* * * *

[L55-L57]

(Procedure in open court 3:00 p.m., July 2, 1973, in the absence of the jury and in the presence of the defendant, Mr. Smaltz, Mr. Keilp and Mr. Lebowitz:)

THE COURT: Mr. Smaltz, let's take these one at a time, first your motion for production of attorney's notes.

MR. SMALTZ: Yes, sir.

THE COURT: Do you have anything to add to what you filed with the Court, that I have already read?

MR. SMALTZ: No, sir, nothing to add.

THE COURT: Very well, Mr. Lebowitz?

MR. LEBOWITZ: Well, Your Honor, again I will restate that these were merely our notes which reflect substances of conversations, our impressions, certain entries that would be classified as trial strategy. They were not taken down verbatim. They were not shown to the people that we were interviewing. Nobody was asked to sign them in the form of a signed statement, and we feel that it is properly the work product of counsel and we would stand on that.

I don't feel that the defense has really shown any cases where, under such facts in point, the government is obliged to turn that over.

Also I take a look at point two of that motion, and there is a reference to Volume XXI of the transcript, where Newman was questioned extensively about offers of testimony made by him or his counsel, wherein there

is then an allegation that the government would not accept it because that wasn't strong enough.

I submit that a review of the record will show that that was the defendant's characterization in the form of questions and that that has never been established as evidence and, in fact, that is not my recollection of the facts.

THE COURT: Anything else, Mr. Smaltz?

MR. SMALTZ: No, sir.

THE COURT: Very well. I don't believe that the requested production comes either within the letter, spirit, intent or requirement of Rule 16. The motion is denied.

MR. SMALTZ: It was 16 and 3500 and Brady.

THE COURT: I realize—3500 or Brady.

* * * *

[L101-L103] (Proceedings in open court, 9:00 o'clock a.m., July 3, 1973, in the presence of the defendant and all counsel and in the absence of the jury:)

THE COURT: Let the record show the presence of the defendant, all counsel, and the absence of the jury.

MR. SMALTZ: Your Honor, I have a motion I would like to make before the defense begins putting on its case.

I take it, the government has rested—that happened Friday—but I have not heard anything from the United States concerning whether or not any exhibits—any additional exhibits were going to be attempted to be introduced or any exhibits marked for identification and which were either not offered or which were offered and rejected, that were going to be reoffered at this time, so I presume that there are none.

THE COURT: Mr. Lebowitz, I understand you went through with the clerk Friday afternoon.

MR. LEBOWITZ: That is correct, Your Honor. I don't believe there are any additional offerings other than those which have already been admitted into evidence.

MR. SMALTZ: All right, Your Honor. The defense moves at this time, under the principles of Brady versus Maryland, U.S. versus Giglio, and there's another case that fits—Giles versus Maryland, to have the government

produce any evidence at all in its possession which is exculpatory to the defendant or which is favorable to the defendant.

Now, as I told this Court on many occasions, I have no knowledge of what is in the government's files or what is in the government's head. When I say "head", I am referring to the collective heads of their investigators and attorneys who are handling this case.

However, I do know that we have had a lot of witnesses in this case, who have been subject to a lot of influence from the government, give testimony, and to the extent that there are any exculpatory statements or any inconsistent statements the government is aware of with the witnesses' testimony here in this court, that is one item in particular that I respectfully request the Court to turn over to the defendant.

Additionally, all other exculpatory evidence which they have in their possession or evidence which will tend to —which is favorable to the defendant, I also move for.

THE COURT: Mr. Lebowitz?

MR. LEBOWITZ: Your Honor, to my knowledge, we have produced everything that we are aware of. We have offered all things that we intend to offer in our case in chief; that, to my knowledge, counsel has seen everything that we have in our possession.

At the same time, I would like to say that insofar as this is the beginning of the defense case, that the defendant's attorney stated that at the outset of their case, the government would be provided with any physical evidence that they intended to introduce in their case in chief. We have not, as yet, received that.

THE COURT: Do you have in your possession or knowledge any exculpatory evidence—

MR. LEBOWITZ: I do not.

THE COURT: —that has not been given to the defendant?

MR. LEBOWITZ: No, Your Honor, I do not.

THE COURT: Very well. Now, Mr. Smaltz, the Court will accept the government's representation at this time until something further is shown by someone.

* * * *

[N337] EDWIN S. NEWMAN,

recalled as a witness by the government, having been previously duly sworn, resumed the stand and testified further as follows on rebuttal:

DIRECT EXAMINATION

BY MR. LEBOWITZ:

* * * *

[N348-N357] Q. Now, Mr. Newman, Mr. Paradine has testified for the defense in this case, and I would like to ask you if you recall how many meetings there were between Mr. Paradine and Mr. Goldberg during the course of his examination in 1968?

MR. SMALTZ: Your Honor, may that be more particularized as to dates, because subsequently Mr. Paradine became an employee of FSL?

THE COURT: He asked during the period of the examination, which would be prior to the time he went to work for—

MR. SMALTZ: Does that go up to May 31st, '68? Is that the date of the examination report?

MR. LEBOWITZ: I am asking in the course of his examination, where—

THE COURT: What were the dates of the examination, do you remember?

Q. BY MR. LEBOWITZ: How long did the examination last, first of all?

A. My recollection is that the examination commenced the beginning of February of 1968 and that the final examination report was submitted on August 7th, 1968.

Q. Now, during that period of time, how many meetings did Mr. Paradine have with Mr. Goldberg, if you recall, and what were they?

A. Well, from the period February, early February, the beginning of the examination, to about the middle of May, there were perhaps only two or three encounters between Mr. Goldberg and Mr. Paradine.

Q. And after that point in May, what occurred?

A. There was a date—there was a date in May, I

think it was around the 20th of May, that Mr. Paradine went out to Mr. Goldberg's ranch in company with me. We had lunch at the ranch and there was discussion on that occasion.

Q. How long did that meeting last?

A. Well, including the luncheon and some socializing and the like, I would say about two and a half hours.

Q. And after May 20th, what occurred next?

Wait a minute, before you answer that question.

Do you have the guest books?

THE CLERK: Uh-huh.

(Exhibit handed to witness.)

Q. BY MR. LEBOWITZ: Now I show you a page marked at the top as May 20th. Do you see a signature of anyone that you know on there?

A. Yes.

Q. And how many signatures do you see there that you recognize?

A. I see four signatures that I recognize.

Q. Are the signatures of any of the persons who were present at the meeting or who you say were present at that meeting indicated on that sheet?

A. Yes.

Q. Who were they?

A. H. A. Paradine and Charles K. Taylor, as well as myself.

(Mr. Smaltz approaching witness and examining exhibit.)

MR. SMALTZ: Who is that (indicating)?

THE WITNESS: I know the signature but he wasn't present at the meeting.

MR. SMALTZ: Just tell me who it is.

THE WITNESS: S. B. Weiner.

Q. BY MR. LEBOWITZ: Now, Mr. Newman, after May 20th, what occurred next, what further contacts were there?

A. Between Mr. Goldberg and Mr. Paradine?

Q. Yes.

A. Well, I next recollect a conversation between Mr. Goldberg and myself.

MR. SMALTZ: Your Honor, that is not responsive.

THE COURT: That wasn't the question.

MR. LEBOWITZ: I will withdraw the question.

Q. You said you had a conversation between Mr. Goldberg and yourself. When was that?

A. That was around the third week in July, 20th or 21st.

Q. And where was this conversation?

MR. SMALTZ: Your Honor, I object to this. This is improper rebuttal.

THE COURT: Well, I don't know whether it is yet, or not, until I hear the content of it.

Q. BY MR. LEBOWITZ: When was this—Who was present at this conversation and where was it?

A. Mr. Goldberg and myself, I believe it took place at the ranch.

Q. Did you talk with Mr. Paradine at that time?

A. Yes.

Q. And what, if anything was said?

A. Mr. Goldberg said to me that Paradine had been out to the ranch and had told him that the examination report was going to have to be changed, that Frash, the Chief Engineer, had taken the position that certain assets that Paradine had admitted, he would not go along with and that certain liabilities that were not there, he would not go along with, and that Paradine had told him that as a result of the changes he would have to make in the report, the company would wind up impaired by some nine to ten thousand dollars, and he said to me that Paradine was very distressed about this and felt very unhappy but that he had no choice.

MR. LEBOWITZ: One second, Mr. Newman.

Q. Mr. Newman, I show you Government's Exhibit 3B-1 (handing exhibit to witness).

This is Mr. Paradine's report.

I ask you to take a look at page 42A.

A. 42A? There is no 42A.

Q. Well, 42, then.

(Witness handing exhibit to Mr. Lebowitz.)

MR. KEILP: Excuse me, Your Honor. I think counsel is looking for 32A.

MR. LEBOWITZ: 32A? I'm sorry.

Q. (Handing exhibit to witness) Now, what is that, Mr. Goldberg—Mr. Newman, on 32A? What is on 32A, Mr. Newman?

A. It's titled "Analysis of non-admitted assets and related items December 31, 1967."

Q. Now, are any of those items that were disallowed by Mr. Frash listed on that sheet?

MR. SMALTZ: Your Honor, how would the witness know that?

MR. LEBOWITZ: If he doesn't know, he can answer the question.

MR. SMALTZ: He is relying on a supposed conversation that was hearsay, in the first instance, if in fact, it ever occurred.

MR. LEBOWITZ: It's not hearsay when he was talking with the defendant.

MR. SMALTZ: It certainly is. It's an exception to the hearsay rule but it's still hearsay.

THE COURT: I don't know how he is going to answer this, from the foundation you have laid so far, as to what was listed or not listed in there, if there isn't some indication he was told what was going to come off.

Q. BY MR. LEBOWITZ: All right, Mr. Newman, did you have occasion to learn what particular assets were not admitted, what particular liabilities were added?

A. Yes, I did.

Q. And when did you learn that?

MR. SMALTZ: Object to his learning it. The report speaks for itself. We have stipulated it could come into evidence.

THE COURT: I think also you have in evidence the final report, don't you?

MR. LEBOWITZ: That is the final report, yes.

THE COURT: All right. Where is the preliminary report that was changed?

MR. LEBOWITZ: Your Honor, I believe that in the final report, it shows what was specifically not admitted.

THE COURT: Well, why don't you take the final report, then? Is that shown in there?

MR. LEBOWITZ: Yes.

THE COURT: He can read what was not admitted but that doesn't complete your picture.

Q. BY MR. LEBOWITZ: Mr. Newman, what was not admitted?

A. Shall I read all of the items?

Q. Yes.

A. "Furniture and equipment $14,521.04; agents' balances, net, $8,483.87; cash advanced to officers, et cetera, $3,843.02; loans on personal security, $3,821.91; premium notes in excess of net value, $40,380; refundable deposits, $610; amounts due from affiliated company, $15,740.06; amounts due from re-insurers, $131,888.12."

Q. Now, Mr. Newman, that last entry that you said, "amounts due from re-insurers", what was that?

A. That was a note due from the National Trust Life Insurance Company of Florida.

Q. Now, what, if anything, do you know about that particular entry?

MR. SMALTZ: I object to that type of question.

MR. LEBOWITZ: Your Honor, this has already been testified to.

THE COURT: What kind of a question is "What do you know about that entry?" Where—where's the relevance?

MR. LEBOWITZ: All right.

Q. Is this one of the specific items that was disallowed by the Department of Insurance?

A. Yes.

Q. And that was for how much money?

A. $131,888.12.

Q. Now, Mr. Newman, there's one other entry on there, "Agents' credit balances." Was that something which had not been admitted prior to 1967?

A. It had never been carried as an admitted asset.

Q. Now, Mr. Newman, would you please turn to page 50 of this report.

Now, Mr. Newman, what's the title on that particular page? I can't see it. Mine's stapled up.

A. "Policy and Contract Claims—Life."

Q. Now, you have stated that certain liabilities had

been added. Are any of those liabilities present on this page?

A. Yes, sir.

Q. And what is that?

MR. SMALTZ: I don't understand that preceding question, that certain liabilities have been added. May I come to the bench and show you the report that this witness read from? In fact, he misread from it.

(Mr. Smaltz approaches the bench.)

MR. SMALTZ: Look at this.

THE COURT: Just a minute. Do you want a reporter?

MR. LEBOWITZ: Your Honor, I am going to object to counsel's—

THE COURT: Wait a minute, wait a minute—

MR. LEBOWITZ: —declarations.

THE COURT: Wait a minute.

AT THE BENCH, OUTSIDE THE HEARING OF THE JURY.

* * * *

[N361-N367]

WITHIN THE HEARING OF THE JURY:

Q. BY MR. LEBOWITZ: Mr. Newman, referring you to page 50, would you please read the last paragraph on that page?

A. "In the 1967 annual statement, the company had claimed $187,667.15 deduction from this liability as being due from National Trust Life Insurance Company of Florida under provisions of a reinsurance agreement whereby the company takes the position it has ceded 99.9 percent of nearly all its assumed group life insurance business.

"The details and involvement of that particular agreement were referred to in an earlier section of this report captioned 'Amounts Due From Reinsurance.'

"In view of the fact that the agreement and responsibilities of the parties involved is presently in litigation and in accordance with conservative standard accounting

procedures applicable to a life insurance company, the examiners have prepared the December 31, 1967 financial statement and supporting exhibits that are included in this examination report without regard to the amount of $197,667.15."

Q. Now, Mr. Newman, do you know whether or not this was the liability that Mr. Paradine was directed to include within his report?

A. Yes.

Q. All right. Mr. Newman, do you know whether or not FSL ever collected that $187,000?

MR. SMALTZ: Your Honor, that's irrelevant.

THE COURT: It's immaterial and irrelevant in this case whether he ever collected it or not.

Q. BY MR. LEBOWITZ: You said that this particular report was concluded, I think you said, on August 7th. How do you know that, sir?

A. I recollect that the—that the order of suspension issued on October 16 recites the dates of various documents reaching the department.

Q. Now, Mr. Newman, do you recall, after you had this conversation with Mr. Goldberg—which you said was when, in July?

A. About the third week in July.

Q. Did you have occasion to see Mr. Paradine after that?

A. Yes.

Q. And when was the next time after July?

A. I saw Mr. Paradine on or about the day that the report was delivered to the department.

Q. Where is this?

A. At the United Bank Building—not the United Bank, the TowneHouse Towers offices.

Q. And did you have a conversation with Mr. Paradine at that time?

A. Yes, I did.

Q. Who was present?

A. Just Mr. Paradine and myself.

MR. SMALTZ: Your Honor, the last time when I objected to this type of conversation, you allowed it only because it was supposedly conversations that occurred between Mr. Goldberg and Mr. Paradine between the

date the report was started and the date the report was ended, presumably in an attempt to impeach Mr. Paradine.

THE COURT: That would be the sole purpose of this.

MR. SMALTZ: We are past the date when the report was prepared. The examination is concluded.

THE COURT: The only thing I can assume is, and it better be true, that this is solely for purposes of impeaching the testimony of Mr. Paradine to something that he stated.

MR. LEBOWITZ: It is.

THE COURT: All right.

Q. BY MR. LEBOWITZ: Do you recall the nature of that conversation with Mr. Paradine at that time?

A. Yes, at that time Mr. Paradine himself delivered the examination report to the company and he said to me, "You know, you have a right of a hearing on this report and I suggest to you that you formally advise the department that you do want a hearing."

Q. Now, did you have any further conversations with Mr. Paradine after this day on this subject?

A. Yes.

Q. Do you recall the next one?

A. Several conversations.

Q. Do you recall the next time you talked to him?

MR. SMALTZ: I still don't see where we're going, Your Honor.

MR. LEBOWITZ: Well, Your Honor—

MR. SMALTZ: I object.

THE COURT: Come up here.

AT THE BENCH, OUTSIDE THE HEARING OF THE JURY, MR. LEBOWITZ, MR. KEILP AND MR. SMALTZ ATTENDING:

THE COURT: What testimony of Paradine's are you trying to impeach?

MR. LEBOWITZ: All right. I asked Mr. Paradine, did you ever tell Mr. Newman or Mr. Goldberg how they should prepare for these hearings. He told them that they should make it informal. They shouldn't appear

with an attorney. He told them how they should prepare a brief. He assisted and gave advice.

THE COURT: What are you going to get out of Newman?

MR. LEBOWITZ: We will get out of him the fact the things that he told them on how to approach this hearing, how to prepare a brief, how they should conduct themselves.

THE COURT: How is that impeachment? This is what Paradine—

MR. LEBOWITZ: These are the things that I asked him and he denied them.

MR. SMALTZ: The only thing Paradine was asked is the question, "Did you prepare that affidavit that Newman submitted?"

MR. LEBOWITZ: No, sir, that's not the only question.

THE COURT: Have you got the record over there?

MR. KEILP: He was asked if he ever suggested—

THE COURT: Have you got the record over there marked where Paradine testifies?

MR. LEBOWITZ: I don't have it up here, but I can get it. It's downstairs. I will show the Court where I asked him, number one, "Did you tell them that they were not to appear without attorneys?" and he said "No, I never said anything like that."

I said, "Didn't you give them advice on how to conduct themselves during this hearing?" He said, "I never did that." He denied all of these.

MR. SMALTZ: Assuming that that's so, I don't remember that. I remember Paradine saying—

THE COURT: I remember him talking about some of it.

MR. LEBOWITZ: It is impeaching him because it goes to the truthfulness of his testimony, his credibility. Isn't that always an issue when you have conflicting witnesses testifying in conflicting things?

MR. SMALTZ: Fine. Then let's have the government show me in the transcript where that was allegedly said. They are just going to walk over the lot with this guy. They will bring him back, wine him up—

THE COURT: Take it up after the recess when you have got a copy of the transcript, to make sure it's in there.

WITHIN THE HEARING OF THE JURY:

Q. BY MR. LEBOWITZ: Mr. Newman, we will come back to that in a minute.

* * * *

[N423-N424] Q. [BY MR. SMALTZ] Since the last time I saw you, how much time have you spent up in the U.S. Attorney's Office?

MR. LEBOWITZ: Your Honor, I don't see that that's really relevant to this inquiry.

THE COURT: He may answer.

A. Since the last time you saw me, I believe I returned to Phoenix on the 4th of July.

Q. BY MR. SMALTZ: Spent all day the 4th up there?

A. Good part of it, five, six hours.

I have been at the government attorneys' offices on an average of five hours a day since—since my return on the 4th of July.

Q. Today is what day, the 9th?

A. Today's the 11th. It's a week ago.

Q. Five hours a day since then?

A. About that.

* * * *

[C.T. 546]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-70-517 Phx.

[Filed Oct. 5, 3:50 PM '73]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP J. GOLDBERG, DEFENDANT

JUDGMENT AND COMMITMENT

On this 5th day of October, 1973, at Phoenix, Arizona came the Attorney for the Government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 18, Section 1341, United States Code (Mail Fraud), as charged in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, and 16.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on each of said counts and said counts to run concurrently. IT IS FURTHER ORDERED that the defendant pay a fine in the amount of $1,000 on each of said counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 16, making a total of $14,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ [Illegible]
United States District Judge

[C.T. 446]

DONALD C. SMALTZ
1 Wilshire Bldg., Suite 2420
Los Angeles, California 90017

[Filed Oct. 5, 1973 W. J. Furstenau, Clerk, United States District Court for the District of Arizona. By R. Womack, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 70-517 PHX-WPC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILIP J. GOLDBERG, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that Philip J. Goldberg, Defendant in the above captioned cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 5th day of October, 1973.

Oct. 5/73

/s/ Donald C. Smaltz
DONALD C. SMALTZ
Attorney for Defendant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1023

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

PHILIP J. GOLDBERG, DEFENDANT-APPELLANT

[December 18, 1974]

On Appeal from the United States District Court
for the District of Arizona

MEMORANDUM

Before: KOELSCH and KILKENNY, Circuit Judges and SWEIGERT, District Judge *

Appellant Goldberg appeals from a judgment imposed by the Court after his conviction by a jury of fourteen counts of an indictment charging violation of 18 U.S.C. § 1341—use of the mail to defraud. He was sentenced to a term of two years imprisonment on each of the 14 counts, the sentences to be served concurrently, and a fine of $1,000 on each count.

Each of the 14 counts charged appellant with a separate transactional instance of use of the mail for the purpose of executing a scheme and artifice to defraud. The scheme alleged in each count was in substance and to the effect that appellant, as President of Financial Security Life Insurance Company, caused the company to issue to various individuals certain so-called single

* The Honorable William T. Sweigert, Senior United States District Judge for the Northern District of California, sitting by designation.

premium annuity policies, purporting to be premium fully prepaid, with a view to their use by the annuitant as collateral for borrowing money from banks and other lending sources; that when lenders, considering such loans, inquired of Financial Security Life Insurance Company (FSL) concerning the status of such policies, appellant caused certain false statements to be made, i.e., that the premiums were paid in full—whereas no payments except interest payments had been made on certain promissory notes accepted by FSL as premium payment; that there were no liens or encumbrances of record against the policies offered as collateral—whereas certain reservations of benefits and proceeds riders reduced the policies to virtually zero; that the face amount of the policy was the cash surrender value that would be paid the annuitant after the date due specified in the policy whereas said policies were worthless; that appellant concealed and withheld from the lenders the material facts that promissory notes had been accepted by FSL in payment of premiums and that the policies were subject to riders providing that the policies would be reduced by the total amount unpaid; that when the policies issued by FSL were accepted by lenders as collateral and presented for payment the lenders would then be informed by appellant that no amounts were payable because no payments had been made on the promissory notes.

It was contended by appellant at the trial that the policies in question had been properly issued, and that the false statements to the lenders "were believed to be correct" and that appellant "had relied upon the advice of his various attorneys." (App. Opp. Brief, p. 6)

Appellant makes no contention that the evidence, if believed by the jury, would be insufficient to support findings adverse to appellant on those issues of fact.

Appellant asserts insufficiency of the evidence only with respect to the use of the mails element of the case, i.e., (1) the implied finding that the letters referenced in Counts 10 and 12 had been placed in the mail, and (2) the implied finding that the mailings referenced in Counts 2, 12, 16, 4 and 14 were for the purpose of executing, within the meaning of Section 1341, the scheme alleged in those Counts.

Other grounds for reversal presented by appellant have to do with claimed errors of the trial judge.

RE INSUFFICENCY OF THE EVIDENCE

1. *Counts 10 and 12—re Proof of Mailing*

It is well established that one "causes" the mails to be used, within the meaning of Section 1341, when he does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen. *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954).

Appellant here does not contend in his brief that the letters referenced in the above counts, if mailed, were not so "caused" to be mailed by him; he contends only that there is insufficient evidence to support the finding that the letters referenced in Counts 10 and 12 were actually placed in the mail.

The mailing of the letter referenced in Count 10, Exhibit 13A, a letter of December 31, 1968, allegedly mailed by one Hoover of Western General Corporation to FSL, was supported only by the testimony of Newman (of FSL) to the effect that he received the letter in the mail. However, Hoover could not recall whether he had mailed that letter to Newman or had delivered it to one Kenslow for delivery to Newman. There is no evidence concerning Hoover's customary practice concerning how letters of this kind were transmitted. The evidence shows, however, that shortly after the date of the letter Hoover and Kenslow did come to Phoenix where Kenslow personally presented the annuity policies referred to in the letter, along with other documents, to Newman. Although a copy of the letter appeared in FSL files, no receipt stamp appears on its face; Newman's testimony about receiving the letter "in the mail" was qualified by adding: "as far as I can determine."

The letter referenced in Count 12 was a letter dated January 24, 1968 (Ex. 10B), allegedly mailed by Newman to FSL to one Skillman of American Mortgage Company. Exhibit 10B was an unsigned copy of the letter. There is no testimony from anyone at FSL con-

cerning the mailing of the letter nor any testimony concerning the custom and practice relating to the mailing of such letters. Newman merely testified that Exhibit 10B was a copy of a letter of January 24, 1969 from him to Skillman. Neither the original of the letter nor the envelope was produced at trial. The copy was received in evidence upon testimony of Skillman that he "received" the letter in the mail.

It is settled that use of the mails, like most other facts, need not be established by direct evidence; it may be established by circumstantial evidence provided, of course, that the circumstances are such as to reasonably support an inference of mailing beyond reasonable doubt. *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2d Cir. 1971). Appellant contends, however, that there is no such evidence of the mailings referenced in Counts 10 and 12.

An examination of cases discussing the standards and guidelines for proof of the mailing requirement of Section 1341 (*United States* v. *Fassoulis*, supra; *United States* v. *Leathers*, 135 F.2d 507 (2d Cir. 1943); *Whealton* v. *United States*, 113 F.2d 710, 713 (1940); *United States* v. *Baker*, 50 F.2d 122 (2d Cir. 1931); *Mackett* v. *United States*, 90 F.2d 462 (7th Cir. 1937); *Freeman* v. *United States*, 20 F.2d 748 (3d Cir. 1927), leads us to the conclusion that proof of mailing the letter referenced in Count 10 falls far short of the guidelines set by even the most liberal of these cases, e.g., *Fassoulis*, *Leathers*, supra) and is insufficient within the meaning of such cases as *Baker*, supra; *Freeman*, supra; *Mackett*, supra and *Whealton*, supra.

We are of the opinion, however, that within the meaning of *United States* v. *Leathers*, *supra*, the evidence is sufficient to support the implied finding of the mailing of the letter (Ex. 10B) referenced in Count 12.

2. *Re Counts 2, 12, 16, 4 and 14—re Proof that Mailing in Execution of the Schemes Charged*

Again we note that appellant makes no contention that the letters referenced in the above counts, if they were mailed in execution of the alleged scheme, would not have been "caused" to be mailed by appellant within

the meaning of Section 1341. Defendant argues only that the letters were not "for the purpose of executing the scheme" within the meaning of the statute.

Since we have already determined that the convictions on Count 10 must be reversed for failure to prove mailing of the letter referenced in that count, it is unecessary to consider defendant's further contention that the letters were not in execution of the scheme.

The letter referenced in Count 2, Exhibit 4A, was a letter dated July 31, 1968, from one Tucker to FSL, relating to single premium life insurances policies—not single premium annuities. Appellant contends that, therefore, it could not be considered to be in furtherance of the scheme charged in Count 2 which refers only to annuities.

The evidence is to the effect that in the summer of 1968 one Tucker, a New York financial broker, had called FSL to discuss mortgage loan commitments and later to discuss the issuance of single premium life insurance policies (not annuity policies). Eventually, Tucker visited FSL at Phoenix and discussed single premium life insurance policies with defendant. It was not, however, until near the end of August, 1968, i.e., after the date of his July 31, 1968 letter, that Tucker for the first time discussed with defendant the possibilities of using single premium annuities.

We find no merit in appellant's narrow point; the correspondence in question led to the ultimate use of annuity policies. Although the July 31, 1968 letter refers only to life insurance policies (as distinguished from annuity policies), Tucker's subsequent contribution of ideas concerning annuity policies stemmed from that earlier correspondence and the letter, therefore, can be deemed to have been in that sense in furtherance of the scheme charged.

The letter referenced in Count 16, Exhibit 5Y, was a letter dated May 6, 1969, from Royal National Bank to FSL demanding that FSL make payment to the bank of certain annuities under a policy which the bank had previously accepted as collateral for a loan. The evidence is to the effect that the letter, making demand for payment by FSL, was mailed 18 months after the bank had actually accepted the policies as collateral.

Appellant contends, citing and relying on *United States* v. *Maze*, 414 U.S. 395 (1974); *Parr* v. *United States*, 363 U.S. 370 (1960); *Kann* v. *United States*, 323 U.S. 88 (1944), that the scheme had reached fruition when the bank accepted the policies as collateral and that, therefore, the letter could not be considered to have been in execution of the scheme charged in Count 16.

In *Maze*, supra, the letter in question was mailed to a bank by the true owner of the bank's credit card requesting adjustment of his account after *Maze*, the defendant in that case, had stolen and misused the credit card to obtain lodging at various motels. The court held (p. 402) that Maze's scheme had already reached fruition when he checked out of the motels and that there was no indication that the success of his scheme depended in any way on the adjustment of loss between his victims.

In the present case, however, the letter in question was from the bank which had been victimized by its acceptance of the policy as collateral, but it was written, not to another victim (as in *Maze*), but to the defrauder, himself, seeking, not merely to adjust a discovered loss, but to realize on the policy collateral, something that appellant herein would reasonably have expected to happen at some time during the period the bank held the collateral in reliance upon appellant's false representation.

Whether a mailing is in furtherance of a scheme does not depend upon mechanical determination of when the mailing occurs but upon a determination of the contribution made by the mailing to the scheme's success. *United States* v. *Klem*, 416 F.2d 346, 350 (9th Cir. 1969).

We are of the opinion, therefore, that here, appellant's scheme had not reached fruition, as in *Maze*, but was in effect continuing up to the time of writing the letter (Ex. 5Y) the mailing of which was caused by appellant and was also in this sense in execution of the scheme.

The letter referenced in Count 4, Exhibit 8B, was a letter dated December 17, 1968, from Newman of FSL to Herman of First National Bank of Mason City in response to a letter inquiry from Herman, dated December 9, 1968, concerning an application of one Darden for a loan based on an FSL policy as collateral.

The evidence is to the effect that on the following day, December 10th (six days before FSL mailed the Count 4 referenced letter), Herman decided not to make the loan to Darden. Appellant contends that, therefore, the letter could not be considered as being in furtherance of the scheme charged in Count 4. (See App. Brief p. 85-101).

We cannot agree. The referenced letter (Ex. 8B) was obviously intended to further the scheme and the mere fact that appellant did not know that the bank had already decided to reject the loan for other reasons does not excuse appellant.

The letter referenced in Count 11, Exhibit 16C, was a letter dated February 7, 1969, from one Friedman of National Bank of North America to FSL inquiring concerning certain FSL policies presented to the bank on the previous day by one Kenslow as further collateral for loans which the bank had already made to Kenslow on January 7, 1969 and January 15, 1969 on the basis, according to defendant, of Kenslow's note rather than on the basis of the FSL policy collateral. Appellant contends that, therefore, Exhibit 16C could not be considered as in execution of the scheme alleged in Count 11; appellant makes a similar contention as to the letter referenced in Count 14, Exhibit 16F, a letter from Newman of FSL to National Bank of North America, dated March 21, 1969, responding to the Exhibit 16C letter referenced in Count 11.

We disagree. Obviously, the sending of Exhibit 16C by the bank indicates that the bank was relying, to some extent at least, on the further security of the policies. Appellant's response to the bank (Ex. 14) was, therefore, in furtherance of appellant's scheme.

RE ERRORS OF LAW

Defendant contends that the trial court erroneously refused to dismiss the indictment upon the grounds that it had been returned after only a one-hour grand jury hearing on other variously asserted charges of "perversion" by the government of the grand jury proceed-

ings. We are satisfied that this ruling of the trial court did not constitute clear prejudicial error. See *United States* v. *Costello*, 350 U.S. 359 (1956).

Defendant contends that the trial court erroneously refused to order the government either to refrain from using or to deliver to defendant a copy of a so-called "jury book"—the United States Attorney's notes concerning the voting record and any known idiosyneracies of jurors on the panel. We are satisfied that this refusal did not constitute prejudicial error even under the circumstances argued by defendant. See *Hamer* v. *United States*, 259 F.2d 274 (9th Cir. 1958).

Defendant further contends that the trial judge erroneously refused to order government disclosure of certain notes taken by Assistant United States Attorneys reflecting the substance of, but not verbatim, discussions with government witness Newman. These notes were taken in discussions with Newman after Newman's written statement of May 11, 1973 which was disclosed to defendant. Apart from the question whether such notes were exempt from the Jencks Act (18 U.S.C. § 3500) as "work product," they were not statements of the defendant within the meaning of § 3500(e). We find no clear, prejudicial error.

Defendant further contends that the trial court erred in permitting cross-examination of the defendant on matters which, defendant asserts, were beyond the scope of direct examination.

Considered in the light of the length and tenor of defendant's direct examination to the effect that his own conduct was free of any intent to defraud and that he was unaware of any improprieties and that he was victimized by his reliance on others, we cannot say that the cross-examination which was allowed by the trial court to refute defendant's testimony, was unreasonable or in excess of the bounds of cross-examination. We find no clear, prejudicial error.

Defendant further contends that the trial court erred in refusing to allow one of defendant's attorneys (Smaltz) to testify concerning an alleged government threat to indict a prospective defense witness (Schwartz) if he testified.

The trial court hearing on this point, held outside the presence of the jury, shows an offer of proof concerning, not a government threat against Schwartz, but only a government statement to defendant's counsel (Smaltz) to the effect that, if defendant intended to call Schwartz, he (defendant's counsel) should inform Schwartz of his Fifth Amendment rights because, if Schwartz testified, there was a considerable possibility he might be indicted; that defendant's counsel did so inform Schwartz; that, upon suggestion of the court, Schwartz was then granted immunity and did testify.

An examination of the record on this point satisfies the court that there was no abuse of discretion on the part of the trial court. We find no clear, prejudicial error.

Defendant contends that the trial court erroneously refused to allow one of the defendant's attorneys (Nazarian) to testify concerning claimed inconsistent statements of the government's witness (Skillman) to the effect that Skillman had stated to Nazarian during an interview with Skillman at the Holiday Inn in Phoenix just prior to the Goldberg trial, that he (Skillman) had informed an Assistant United States Attorney, that, if he (Skillman) was to testify for the government, he wanted comfortable accommodations and would not stay in a county jail—a statement which Skillman had on cross-examination denied making.

Considering the circumstances shown by the record we are of the opinion that the trial court's refusal to allow Nazarian, who had participated as defendant's counsel, to testify to the claimed inconsistent statements of Skillman was not in abuse of discretion. Skillman had been cross-examined by defendant's counsel on these statements allegedly made to Nazarian, yet Nazarian continued as co-counsel for two to three weeks thereafter without either withdrawing or indicating to the government that he was a potential witness in the case. We find no clear, prejudicial error.

Defendant further contends that during the government's rebuttal argument to the jury, government counsel made statements of fact, referring to Stillman's testimony above referred to but not shown by any evidence,

to the effect that witnesses brought by the government from federal penitentiaries to testify, normally stay at the closest federally approved detention center, normally a jail within a city, but that Phoenix did not have such a federally approved detention center and the closest was at Florence—60 miles away.

Defendant contends that this statement was, not only outside the evidence, but also false. Defendant attaches to his brief a copy of a contract between the Bureau of Prisons and Maricopa County providing for detention of federal prisoners at the Maricopa County Jail. Defendant's counsel, conceding that no objection was made at trial to this claimed improper argument, explains that he did not know the true state of affairs until after the trial.

Appellee concedes that its remark concerning the nonexistence of a federally approved jail near Phoenix was erroneously but innocently made and, further, that its remark concerning safety was made in a good faith attempt to indicate that prisoners who are called to testify for the government are sometimes kept apart from other prisoners in the interest of protecting the witness, not from the defendant in the case, but from other prisoners. Considering all the circumstances shown by the record, we are satisfied that the remarks of government counsel on these matters, which was quite collateral to the main issues, were not so out of line as to deprive defendant of a fair trial. We find no clear, prejudicial error.

Defendant contends that the trial court erroneously refused during the cross-examination of government witness, Newman, to make an order requiring the government to produce all its records of conversations between attorneys for Newman and attorneys for the government relating to the making of a written plea bargaining agreement with Newman that had been reduced to writing and disclosed to counsel for appellant.

Defendant argues that, although the written agreement was to the effect that Newman was to plead guilty to one count of the indictment and although Newman admitted to that effect on the stand, the government, after

the Goldberg trial, actually permitted Newman to plead to new misdemeanor charges and dismissed the felony indictment charges.

On this point we are satisfied that the government's decision, made afer the trial, to go somewhat further than the written agreement provided, did not amount to a failure to fully disclose a bargaining agreement with the witness Newman. Even if it did, it would not have prejudiced defendant who had been timely informed of the written bargaining agreement for recommended probation and given full opportunity to cross-examine Newman concerning promises. See, *United States* v. *Polizzi*, 500 F.2d 856 (9th Cir. 1974). We find no clear, prejudicial error.

For the reasons above set forth the judgment of the District Court is affirmed except that the judgment on Count 10 is reversed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1023

(Dc-70-517WPF)

[Filed Feb. 5, 1975, U.S. Court of Appeals]

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

PHILIP J. GOLDBERG, DEFENDANT-APPELLANT

Before: KOELSCH and KILKENNY, Circuit Judges, and SWEIGERT,* District Judge.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

The members of the panel voted unanimously to deny the petition for panel rehearing. Judge Koelsch voted against a rehearing in banc, and Judges Kilkenny and Sweigert recommended against such a rehearing.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. F. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

---

* The Honorable William T. Sweigert, United States District Judge for the Northern District of California, sitting by designation.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-6293

PHILIP J. GOLDBERG, PETITIONER

v.

UNITED STATES

On petition for a writ of Certiorari to the United States Court of Appeals for the

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 8 presented by the petition which reads as follows:

"Whether 18 U.S.C. § 3500, the Jencks Act, contains an 'attorney's work product exception'; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time where the witness corrected same, which notes were prepared 'only after lengthy conversations had occurred and a mutual understanding of the factual situation' had been reached, if not compellable under the Jencks Act, and compellable under the doctrine of Brady v. Maryland."

June 16, 1975

Mr. Justice Douglas took no part in the consideration or decision of this motion and petition.

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No. 74-6293

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

PHILIP J. GOLDBERG, PETITIONER

ORIGINAL COPY

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-6293

PHILIP J. GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims error in the presentation of the case to the grand jury, in the trial court's rulings and instructions, and in the court's refusal to order the government to make certain disclosures.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on fourteen counts of using the mails to defraud, in violation of 18 U.S.C. 1341. He was fined $1000 and sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals reversed his conviction on one count and affirmed his convictions on the remaining counts (Pet. App. A). The court denied rehearing (Pet. App. B).

1. Petitioner claims that his indictment was invalid because one hour was insufficient for proper grand jury deliberation, the government's evidence before the grand jury consisted primarily of a hearsay account by the chief investigating agent, petitioner's request to testify before the grand jury was refused, and the evidence before the grand jury was not recorded. The court of appeals correctly held that, under United States v. Costello, 350 U.S. 359, these facts did not invalidate the indictment (Pet. App. 7). See also Lawn v. United States, 355 U.S. 379; United States v. Calandra, 414 U.S. 338, 342-345.

2. The court of appeals correctly held (Pet. App. 7-8) that the trial court properly refused to order the government either to refrain from using, or to deliver to petitioner a copy of, the "jury book" -- the prosecutor's notes concerning the jury venire. See Hamer v. United States, 259 F. 2d 274, 280-281 (C.A. 9), rejecting the contention that use of a jury-book created an unequal situation in the selection of the jury." Id. at 278. That petitioner was indigent did not entitle him to the prosecutor's investigative work product.

3. There is no merit to petitioner's claim that he was entitled to an instruction concerning concerning evidence of his good character. He did not actually introduce any character witnesses. Rather, in cross-examining a government witness in an effort to impeach her, he merely asked about her personal opinion of petitioner's general character, rather than about his reputation in the community (Tr. B, 199).

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4. Petitioner contends that the trial court erroneously permitted the jury to consider evidence of uncharged misconduct as proof of his guilt (Pet. 25, n.). The fraudulent scheme with which petitioner was charged, however, involved the issuance of single premium annuity policies, falsely purporting to be prepaid, for use as collateral for borrowing money from banks and other lenders (see Pet. App. 1-2). The challenged evidence concerned the policies and the company that issued them and hence was relevant to the fraudulent scheme charged by the indictment.

5. There is no basis for petitioner's claim that the prosecutor failed to disclose the full details of its plea bargain agreement with a co-defendant who testified as a government witness. A written agreement provided that the witness would be permitted to plead guilty to one count of the pending indictment and that probation would be recommended; a copy of this agreement was given to petitioner and formed the basis for stringent cross-examination of the witness. As the court of appeals found (Pet. App. 10), the determination to dismiss the indictment altogether against the witness and permit him to plead to new misdemeanor charges was made after trial, and hence was not part of a bargain to be disclosed at trial.

6. Petitioner's contention that the prosecutor threatened to indict a potential defense witness if the latter testified was the subject of a hearing by the trial court out of the presence of the jury. As the court of appeals noted (Pet. App. 8), the hearing disclosed that no threat was made, but rather that the prosecutor suggested to petitioner's attorney that the witness be advised of his Fifth Amendment rights because he might be indicted. The witness was so advised, but the prosecutor pledged to the

court that no indictment would be brought against him, and the witness testified. Petitioner's related complaint that one of his attorneys was not permitted to testify to rebut statements made by another government witness on cross-examination involves a collateral matter and exclusion of the proffered testimony was therefore within the trial court's discretion.

7. There is no merit to petitioner's contention that nondisclosure of notes made by the prosecutor concerning interviews with a principle government witness violated 18 U.S.C. 3500 and the principle of Brady v. Maryland, 373 U.S. 83. The government provided petitioner with a copy of the 89 page typewritten statement made by the witness in a two-and-one-half hour recorded conversation. The prosecutor's handwritten notes, based on some 40 hours of conferences with the witness, included the prosecutor's impressions, points of trial strategy, and explanations by the witness of items of physical evidence concerning which he did not himself testify. The court of appeals thus correctly held (Pet. App. 8) that the notes did not comprise a "statement" within the meaning of the Jencks Act.[1/] And, since

---

1/ AIthough the court of appeals stated that the notes "were not statements of the defendant within the meaning of § 3500(e)" (Pet. App. 8), it is clear from the court's preceding discussion that it meant that the notes did not constitute statements of the witness for Jencks Act purposes.

petitioner does not contend that the notes exculpated him in any way, his reliance upon Brady is misplaced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The Memorandum Opinion of the Court of Appeals, which was directed by that court not to be published in the Official Reports, is set forth at pages 113 through 123 of the Appendix. The order denying petitioner's petition for rehearing is at page 124 of the Appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Its judgment was entered on December 18, 1974. On February 6, 1975, the Court of Appeals denied a petition for rehearing with a suggestion for rehearing en banc. (Ap. 124) By order of March 5, 1975, Mr. Justice Brennan extended the time for filing a petition for writ of certiorari to and including April 5, 1975. The petition was filed April 3, 1975, and certiorari was granted on June 16, 1975. (Ap. 125)

QUESTIONS PRESENTED

This case presents the issue of a defendant's entitlement upon timely motion to the notes of the prosecutors which reflect statements made to them by a key Government witness in interviews prior to that witness' trial testimony.

The witness, Edwin S. Newman, whose interview notes were sought by petitioner, was a co-defendant in the scheme charged in the indictment, and immediately prior to trial entered into a deal with the Government whereby he was to give the prosecution a complete statement under oath of all the details relating to the indictment and to testify at trial "in conformity" with that statement.

At the prosecutors' first interview with Newman, a reporter was present, and a transcript of that testimony was furnished petitioner. The prosecutors concluded

that first session with the express acknowledgment that there were additional matters about which Newman would be questioned at a later time. Thereafter, Newman met with only the prosecutors on five different days, spending in excess of 40 hours total in these meetings. During the interviews, the prosecutors took notes which they from time to time read back to Newman; Newman sometimes corrected their read-backs. These prosecutors' notes were "often prepared after lengthy conversations occurred and a mutual understanding of the factual situation had been reached."

After Newman's testimony on direct examination, petitioner on three separate occasions, under the authority of the Jencks Act and the rationale of *Brady v. Maryland*, requested production of these notes in connection with his cross-examination of Newman. The trial court refused to even inspect the notes – let alone order them produced – on the basis that the notes were "work product of the attorneys" and thus insulated from production under the Jencks Act and *Brady*.

These "notes" have never become a part of the record of the proceedings in this case. Although the Government argued in its brief to the Circuit Court that the notes were part of the record, at oral argument before the Ninth Circuit, more than a year after the trial, the Government conceded they were not part of the record. One of the prosecutors then presented a batch of papers and requested permission to "lodge" these with the Panel. He described this packet as all the notes he could then find. The Ninth Court permitted them to be lodged. In its unpublished opinion, the

Circuit did not meet the work product issue, but instead held that the notes were "not statements of the *defendant* within the meaning of 3500(e)." Petitioner had never contended they were his statements, but rather statements of the witness, Newman. The Court of Appeals, based on materials which were not part of the record, found no clear, prejudicial error in the actions of the trial court.

The questions as to which this Court granted the writ are as follows:

> Whether 18 U.S.C. § 3500, the Jencks Act, contains an "attorney's work product exception"; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time, where the witness corrected same, which notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation" had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of *Brady v. Maryland*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Amendment V to the United States Constitution provides in pertinent part:

> "No person * * * shall * * * be deprived of life, liberty, or property, without due process of law * * *."

2. Amendment VI to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor * * *."

3. 18 U.S.C. § 3500, the Jencks Act, provides in pertinent part:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> "(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such

procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

* * *

"(e) the term 'statement' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means –

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

STATEMENT OF THE CASE

In October, 1970, a 17-count indictment was filed in the United States District Court, District of Arizona, Phoenix Division, charging petitioner PHILIP J. GOLDBERG and codefendants, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK, with violations of 18 U.S.C. § 1341, the mail fraud statute. Codefendants

Tucker, Skillman and Clark all pleaded guilty to at least one count of the indictment. Tucker and Skillman were sentenced before and Clark was sentenced after petitioner's trial. (Ap. 4, 8 and 30)[1] Immediately prior to trial, the Government dismissed three of the 17 counts of the indictment and, pursuant to an agreement with codefendant Newman, severed his case from petitioner's. (Ap. 48)[2] Petitioner's jury trial commenced May 22, 1973, and concluded on July 14, 1973, when the jury found him guilty on all 14 counts. (Ap. 28)

On October 5, 1973, petitioner was sentenced to a term of two years imprisonment on each of the 14 counts of which he was convicted, the prison terms to be served concurrently, and a fine of $1,000 on each of the counts. (Ap. 111) The Court of Appeals affirmed petitioner's conviction on 13 of the 14 counts, and reversed his conviction on count 10 because of insufficient proof of mailing. (Ap. 123)

A. Background Of Petitioner

Petitioner Philip J. Goldberg had been in the insurance business since 1951 when he commenced selling life insurance in New York. (R.T. M21)[3] He

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[1] "Ap." refers to the Appendix.

[2] Newman's case never went to trial, as the indictment against him was dismissed on December 17, 1973. (Ap. 32)

[3] "R.T." refers to the Reporter's Transcript which is in 15 volumes, each volume containing a separate letter designation and lettered as Volumes A through O. "C.T." refers to the Clerk's Transcript, which is in two volumes: Vol. I, pages 1-253; and Vol. II, pages 255-580. "Ex." refers to exhibits. Pages 57 through 80 of the Appendix contain an index to the Reporter's Transcript.

achieved considerable success and by 1961 had sold or placed in force $200 million worth of life insurance. (Ex. U13 [R.T. K294] and 19F [E204]) In 1962, petitioner became chairman of the board of Hamilton Life Insurance Company, a national publicly held company.[4]

Petitioner was regarded as an innovator of techniques and concepts in the insurance field, having been the architect of the concept of a "holding", operating company for affiliated life insurance companies," which concept had been adopted by almost every major life insurance company by the late 1960's. (R.T. M24-26)

In late 1965, petitioner and his family moved to Phoenix. Petitioner acquired all the outstanding stock of Financial Security Life Insurance Company ("FSL") and served as FSL's president until 1969. It was FSL's issuance of single premium annuity policies while petitioner owned and controlled it that formed the gravamen of the indictment.

B. FSL's Operations – An Overview

By late 1967, FSL was a full reserve life insurance company chartered in Arizona, having in excess of $112

[4]In addition to his activities in the insurance field, petitioner served as an economic assistant to the United States Ambassador to the United Nations. He had written various books and articles about life insurance, estate planning and related subjects. (Ex. Q9 [R.T. K262], Q10 [R.T. K262], U15 [R.T. N75], U16 [R.T. N75], U17 [R.T. N75], U49 [R.T. N76], and U50 [R.T. N76].) He was in all respects an acknowledged expert in the insurance field and served on the faculty of Purdue University, as well as being a trustee of the N.Y.U. Law School. (R.T. M31) (Ex. U14, U16 and 19F [R.T. E204].)

million worth of life insurance in force. (Ex. 1C, p. 15 [R.T. A307]) It commenced issuing single premium annuity policies to various individual annuitants. Petitioner's concept was that an executive could exchange restricted assets, such as lettered stock, for an annuity policy; the effective commencement pay-off date of the policy would coincide with the lifting of the investment restrictions on the stock, so that FSL could sell the stock and, in the intervening period, the annuitant would have a fully paid policy to be used for various purposes, including collateral for loans. (R.T. M80-82)

In the majority of instances, FSL took from the annuitant as payment for the annuity policy a premium note in the face amount of the policy. A premium note is legitimate and proper payment for a policy. (R.T. B223-24) The note, in turn, was usually guaranteed by a Colorado holding company, Financial General Capital Corporation ("FGCC"). FGCC was a corporation in which petitioner owned the controlling interest. To induce FGCC to guarantee the premium note to FSL, the annuitant was usually required to transfer to FGCC lettered stock at double the amount of the premium note to FSL. The conveyance of the stock to FGCC was coupled with an agreement whereby FGCC could sell the stock after a stated period to fund its guarantee to FSL of the annuitant's premium note, and usually contained a provision enabling the annuitant to buy back the stock at a higher price than that at which it was valued at the time of transfer to FGCC.

Concurrently with the execution of the premium note, the annuitant was required to execute a "reservation of benefits and proceeds rider" which

provided that, as between FSL and the annuitant, the value of the policy was reduced by the amount of the outstanding premium note.

The annuitant would utilize the annuity policy to collateralize a new or existing loan from a lender. (R.T. K326-336) (Ex. Q16 [R.T. K326]) When the lender would inquire of FSL as to the value of the annuity policy, FSL would inform the lender that the policy was fully paid, that there were no liens or encumbrances against the policy, and that the face value of the policy was the cash surrender value of the policy. Because FSL did not necessarily follow the same procedure with regard to the issuance of all the policies, variations evolved as time went on. (Ex. U54(1) – (16) [R.T. N182]; Ex. U52 [R.T. N167]; Ex. 10M [R.T. F222])

On April 18, 1969, after a New York bank seized the proceeds of its statutory deposit, FSL was suspended by the Arizona Insurance Commissioner. (R.T. B252-256) FSL was prohibited from conducting any further business. (R.T. B256 and L391) After protracted litigation with the Insurance Commissioner through the summer of 1969, the company was ultimately put into receivership. (R.T. L388) (Ex. 3NN [R.T. A308])

C. The Scheme Charged in the Indictment

The indictment (Ap. 33) alleges that commencing January 20, 1968, through January 9, 1970, petitioner and his four co-defendants devised a scheme for obtaining money by false statements to lending sources that could be induced to loan money and to take

single-premium annuities of FSL as collateral to secure the repayment of such loans; that in execution of this scheme, petitioner and his codefendants caused annuity policies to be used to borrow money from persons, banks and other lending sources, and that as to these persons "that made and considered making loans" to be collateralized with single-premium annuity policies issued by FSL, defendants caused the following false statements to be made:

(a) That the premiums were paid in full on the annuity policies – whereas, no payments except interest payments had been made on the promissory notes accepted by FSL.

(b) There were no liens or encumbrances of record against single-premium annuity policies offered as collateral – whereas, the reservation of benefits and proceeds riders reduced the policies to zero.

(c) That the face amount of the policy was the cash surrender value that would be paid to the annuitant after the due date specified in the policy – whereas, said policies were worthless.

That defendants withheld and concealed from the lenders the material facts that promissory notes had been accepted by FSL in payment of premiums, and that the policies were subject to riders providing that the policies would be reduced by the total amount unpaid.

That when these policies were issued by FSL "and accepted by lenders as collateral" and presented for payment, the lenders would be informed that no amounts were payable because no payments had been made on the promissory note.

The 14 count mailings of the indictment upon which petitioner was tried involved annuities issued to six

individuals. Two of the codefendants, Clark and Skillman, received annuities. Tucker arranged for the placement of some annuities. Newman was the vice president and a director of FSL and president of the holding company, FGCC.

Petitioner's defense was that the annuity concept was lawful and proper; that he relied upon his attorneys, including Newman, to insure the legitimacy of the program, and that his attorneys, including Newman, drafted the form of responses to the lenders; that FSL, rather than acting in concert with Skillman as the indictment alleged, had in fact been defrauded by Skillman, who had perverted the annuity concept for Skillman's own financial gain, and in the process bilked FSL of over a million dollars.

D. The Government's Key Witness – Edwin S. Newman

Edwin S. Newman, who at trial testified he was then the "legal and reference editor" for Oceana Publications (R.T. J127), was the only codefendant who had been an officer, director or employee of FSL. Newman had been intimately associated with petitioner in the capacity of a lawyer and executive officer of various companies with which petitioner had been affiliated for over a decade. (R.T. G127-28)[5]

[5]Newman had been associated with petitioner in his various insurance businesses from 1959 through 1969. Under the terms of his initial employment contract dated December 1, 1959, with Philip J. Goldberg Associates, Newman's duties were to include: "serving as house counsel to Philip J. Goldberg, and Philip J. Goldberg Associates, including the furnishing of legal advice." (Ex. U31 [R.T. N84].)

1. Newman's "Deal" Required a Complete Statement Prior to His Trial Testimony

Four days before petitioner and Newman's trial was then scheduled to commence,[6] Newman entered into a most unusual written plea agreement with the Government. (Ex. Q-3 for identification; Ap. 48) The agreement provided that if *petitioner entered a guilty plea*, Newman would be permitted to plead to two misdemeanor tax counts, but if *petitioner went to trial*, Newman would plead to one count of the indictment. Under the terms of this agreement:[7]

1. Newman was required to "give the United States a *complete* statement under oath concerning those events which are the subject for prosecution in CR-70-517-PHX.WPC."

2. The Government was to sever Newman's case from petitioner's, and Newman was to "testify as a witness for the United States, said testimony *being in*

[6]The trial was scheduled to commence on May 15, 1973. However, on May 14, 1973, for the first time and after repeated previous denials, both on and off the record, the Government finally admitted to electronic surveillance of petitioner after petitioner filed a copy of an article from the *New York Times* which revealed the surveillance. (C.T. 250-255) After a hearing on May 14, 1973, the court continued the trial for production of the fruits of the surveillance, which included 17 tapes, each approximately one hour in length, of conversations of defendant with various persons, including his attorneys, between January 25 and March 6, 1973. (C.T. 353) The trial was then continued to May 23, 1973, when it commenced. (R.T. A115-141)

[7]Petitioner unsuccessfully attempted to have this agreement (Ex. Q3 for identification) received in evidence. The court upheld the prosecutor's objections, but did permit counsel to question Newman about it. (Ap. 83-84)

conformity with the statement having been given to the United States Attorney under oath before trial."

3. If Newman failed to honor the terms of that agreement, "upon the conclusion of a trial of Philip J. Goldberg which results in a conviction, that the United States shall use . . . [his] pretrial statement under oath as well as . . . [his] testimony at the trial of Philip J. Goldberg against . . . [him] in a subsequent trial. . . ."

On the same day that the plea agreement was dated, May 11, Newman participated in a 2-½ hour question and answer session with two attorneys for the Government and his own counsel, at which a reporter was present. Newman's testimony briefly touched upon some of the transactions alleged in the indictment. This session concluded with the prosecutor's observations:

> "For the record, the time is now 4:30. We have not exhausted all the transactions of which Mr. Newman can testify.
>
> * * *
>
> "We intend to continue this discussion off the record at a later time this weekend, and there are individuals . . . as well as the Goldberg transactions . . . which will be explored at a further time." (Ap. 52)

Thereafter, Newman met with just the two prosecutors, Messrs. Lebowitz and Keilp, on May 13, June 9, 10, 16 and 17.[8] (Ap. 90-91)

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[8]The Government in its brief to the Ninth Court stated that the number of the prosecutors' hours with Newman in these conferences was "in excess of 40 total hours spent." (Brief for Appellee at 63, *United States v. Goldberg*, No. 74-1023 (9th Cir. 1974) [hereinafter cited as Appellee's Ninth Circuit Brief])

2. Newman's Testimony on Direct Examination

Newman was the thirty-fifth and last witness called by the Government in its case in chief.

Newman was an honor graduate of Columbia Law School, and a member of the New York Bar since 1943. From 1960 through 1969, Newman served in various capacities with companies with which petitioner was affiliated. (R.T. J127-130; K130-136; K140-142) (Ex. Q1 [R.T. K139] In 1966, he moved from New York to Phoenix, where he became Vice-Chairman of the Board of FSL and President of FGCC. (R.T. J130) Newman was a signatory to all correspondence emanating from FSL to lenders, and all but two of the count mailings from FSL were executed and sent by or to him.[9] It was Newman who, after consulting with a Phoenix attorney, provided the form of responses to the lenders which were utilized by FSL and ultimately resulted in petitioner's indictment. (R.T. J341-345) During trial the judge as well as the prosecution described the correspondence which emanated from Newman as the crux of the Government's case. (R.T. 0123 and K21)

Newman's testimony on direct examination commenced on Friday, June 22 (R.T. J126), and concluded on Wednesday, June 27. (R.T. K118) On direct examination his testimony spanned 440 pages.[10] It was

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[9]Ct. 1 - Ex. 5N [R.T. B159]; Ct. 3 - Ex. 6A [R.T. D258]; Ct. 4 - Ex. 8B [R.T. E396]; Ct. 5 - Ex. 7A [R.T. D306]; Ct. 6 - Ex. 7B [R.T. E 124]; Ct. 7 - Ex. 10A [R.T. F244]; Ct. 8 - Ex. 11A [R.T. D40]; Ct. 9 - Ex. 7C [R.T. E121]; Ct. 10 - Ex. 13A [R.T. H297]; Ct. 12 - Ex. 10B [R.T. F246]; Ct. 14 - Ex. 16F [R.T. H412]; Ct. 16 - Ex. 5Y [R.T. B159].

[10]Newman's redirect examination covered 60 pages; he was the sole Government witness on rebuttal. (R.T. N377)

on Newman's testimony that the Government relied to prove the alleged knowledge and scienter of petitioner. It was through Newman's testimony on direct that the prosecutors tied the working of the alleged illegal scheme to petitioner. Newman's signature was on practically every piece of correspondence that emanated from FSL, and he was the individual in most cases who negotiated with the lenders and answered their inquiries. (*See* footnote 9, *supra*.) On Direct examination, in essence Newman admitted that he had known the responses were illegal and testified that he "felt guilty about sending the letters out" (R.T. K30), and then attempted to attribute that knowledge to petitioner through alleged conversations with petitioner.[11] Newman purported to testify on direct examination practically in *ipsissimis verbis* to 91 conversations he allegedly had with petitioner.

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[11]Newman so testified specifically with regard to a host of correspondence, over petitioner's vigorous objections. E.g.:

Re Exhibit	*R.T. Pages*
Ex. 10D-14	K28-32
Ex. 10F	K33
Ex. 3I-56(7), (8a)	K35-39
Ex. 7B, 7C	K41-43
Ex. 7G	K45-49
Ex. 7C, 7F	K49-51
Ex. 10A	K51-56
Ex. 12	K56-60
Ex. 20B, 3Z	K64-69
Ex. 20A	K69-74
Ex. 10B, 19A	K74-78
Ex. 16C	K79-82
Ex. 16D - F	K82-88
Ex. 12G, 3T-39	K94-108
Ex. 3L-69	K108-111
Ex. 32B	K112-117

The trial testimony of Newman on direct examination ranged far afield of the matters he touched upon in the May 11, 1973, statement, not only as to matters discussed, but the details of the transactions. (Ap. 90) Compared with his trial testimony, the May 11 statement barely scratched the surface, as the following summary reflects:

	Newman's May 11 Statement	Newman's Direct Testimony
Pages	90	392
Ipsissimis verbis conversations with petitioners	8	91
Trial exhibits mentioned or discussed	27	67
Transcript pages of exhibit discussion	67	373
Pages mentioning or discussing transactions with annuitants or lenders	75	317
Individual or corporate lenders, or annuitants, not mentioned in May 11 statement:		
Royal Bank		46
Mr. Brickey		10
Franklin/Williams/Peters		16
Messrs. Friedman & Potter		10

Exhibit 1 to this brief sets out with particularity the specific transcript pages and exhibits referred to above.

3. The Facts Established at the Time of Petitioner's Requests for the Prosecutors' Notes

Shortly after petitioner's commencement of cross-examination of Newman on June 27, it was established that:

1. Newman, following his May 11 statement, had met with the prosecutors for interviews in connection with his trial testimony on at least five different days prior to his testimony on direct examination. (Ap. 90-91)

2. No reporter was present at these meetings with the two prosecutors, Messrs. Lebowitz and Keilp, and neither of the two postal inspectors who assisted the prosecution both prior to and during the trial was present. Only Newman and the prosecutors were present. (Ap. 90-93)

3. During the interviews, the prosecutors took notes which they read back to Newman from time to time and Newman would correct them. (Ap. 92)

4. These notes were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached.[12]

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[12]This characterization was not adduced in those words at trial, but it was the Government's characterization of the events giving rise to the preparation of these notes in its brief (Appellee's Ninth Circuit Brief at 64).

Accordingly, petitioner moved for production of the notes under the Jencks Act, 18 U.S.C. § 3500. The court, without waiting to hear from the Government or even inspecting the notes stated: "Aren't these attorney's work product, notes of interviews with witnesses, just like yours are? Denied." (Ap. 94)

When petitioner attempted to argue the applicability of the Jencks Act, *the court insisted* that a work product privilege protected these notes from discovery by a defendant and noted that petitioner had already received the statement of the witness taken May 11, 1973. In denying that motion, the trial judge, without an examination of the notes, concluded that the notes necessarily contained the attorneys' impressions, plans and strategy, and insisted that the work product privilege applied.

The court was proceeding on the premise that the May 11 statement was Newman's complete statement. In an effort to dispell that incorrect assumption, petitioner then directed the court's attention to the prosecutor's comments at the end of the May 11 statement that the interview would be continued at a later time and cover other matters not noted on the statement and simultaneously filed the May 11th statement as Motion Exhibit A. (Ap. 94-95) Petitioner argued that he had made a prima facie case since the witness admitted that the Government attorneys were taking notes which they read back to the witness. The court refused to reconsider its ruling until petitioner found a case that held an attorney's notes were compellable under Jencks.[13]

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[13]Ap. 94:

"THE COURT: Until you put your finger on one that goes directly to this issue, the motion is denied, pending

At the opening of trial the next day, Thursday, June 28, while Newman was still on the stand, petitioner again moved for the notes under the Jencks Act, stating:

> ". . . Your Honor, the objection that has been raised by the Court has been that the materials constitute attorney's work product. I don't know how your Honor could make that observation unless you personally inspect whatever documents or notes the Government counsel have in their possession." (Ap. 97)

The court responded that there was no question about the fact that the notes were made by an attorney while interviewing a witness. Petitioner observed that he had done some limited research and had not found any case that said notes taken by an attorney are not compellable. The court thereupon stated:

> "The question isn't whether they are compellable; the question is are they compellable.
>
> "MR. SMALTZ: No, sir, but I didn't find one that says they are not. And the Jencks Act–" (Ap. 97)

At this point the court cut off the discourse and instructed counsel that the trial would proceed and that petitioner was to prepare a memorandum for Monday, July 2. Petitioner agreed and again requested the court to examine the notes in camera. The court again declined to inspect the notes. (Ap. 98)

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reopening if you can get me some authority for use of attorney's work product in interviewing a witness, with his impressions, plans, his strategy and the witness' testimony, when you have already got reduced to testimony a statement of the witness, that this attorney's notes in preparation for trial should be discoverable."

The following Monday, July 2,[14] petitioner filed with the court a memorandum requesting production of Newman's statements under both the Jencks Act and *Brady v. Maryland* and its progeny. (Ap. 53-56) Petitioner was not able to cite a case which held that an attorney's notes were compellable under the Jencks Act. The memorandum noted, *inter alia*, that the Jencks Act itself did not provide a work product exception, and that even in civil cases the work product doctrine gave way upon an appropriate showing of need. The memorandum renewed petitioner's request for an in camera inspection and, after same, a reconsideration by the court of the matter.

The court, again without ever looking at the notes, upheld the work product objection then made for the first time by the Government (discussed *infra*), and denied petitioner's motion for production of the notes under the authority of 18 U.S.C. 3500 and the *Brady* doctrine. (Ap. 99) Thus, the notes were *never* examined in camera and *never* made a part of the record.

4. The Government Switched Theories in the Courts Below Re Why the Notes Were Not Compellable.

When petitioner first requested the prosecutors' notes on June 27, the Government said nothing about their position on the matter. (Ap. 94-95) Similarly, on the next day, when petitioner renewed his request, the Government remained silent. (Ap. 97-98) No response

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[14]By this time, Newman was no longer on the stand, cross-examination having been completed on Friday, June 29, 1973.

to petitioner's memorandum of July 2 was filed by the Government, but at the hearing on that motion, the Government counsel announced from the podium (not from the witness stand) for the first time that these notes:

> "... were merely our notes which reflect substances of conversations, our impressions, certain entries that would be classified as trial strategy. They were not taken down verbatim. They were not shown to the people that we were interviewing. Nobody was asked to sign them in the form of a signed statement, and *we feel that it is properly the work product of counsel and we would stand on that.*" (Ap. 98; emphasis added.)

Government counsel had obviously taken their cue from the court's previous observations and were maintaining that the work product doctrine precluded production.[15]

In the Government's brief to the Court of Appeals, however, it abandoned the "work product" claim as a basis for non-compliance with petitioner's request, stating:

> "The appellee does not quarrel with the holding that handwritings or notes by an Assistant U.S. Attorney which constitute a 'statement' should be delivered to the defense at the appropriate time under the provisions of the Jencks Act." (Appellee's Ninth Circuit Brief at 64).

The Government thus shifted to a new ground from that advanced below, *viz.*, that the prosecutors' notes

[15]The Government did not deny that the notes were read back to Newman and corrected by him.

did not constitute statements of the witness Newman within the meaning of § 3500(e). (*Id.* at 65)[16] In making this new "objection" the Government argued:

(i) Since petitioner had been furnished with the May 11, 1973, statement and since Newman spent in excess of 40 hours total conference time and the attorneys' notes were allegedly less than the 89 pages of the May 11 transcript, the defendant obviously wasn't prejudiced by failure to have the attorneys' notes. (*Id.* at 62-63)

(ii) That since Newman "did far more than answer questions . . . he helped the Government attorneys in drafting questions to be asked of him and other witnesses . . . suggest[ed] areas of cross-examination . . . in the event [petitioner] testified . . . explained . . . almost endless numbers of letters, documents and other pieces of physical evidence . . . and provid[ed] invaluable insight into the personality and past history of Philip Goldberg" the notes did not reflect the "complex degree of conversation" preceding their recordation. (*Id.* at 64)

(iii) That the notes lacked sufficient specificity for a foundation to use as a prior inconsistent statement. (*Id.* at 64)

(iv) That petitioner did not prove that the entirety of the notes was read back and that "the record suggests by virtue of the questions propounded by the defendant only a partial reading occurred." (*Id.* at 66)

[16]The Government in its brief to the Circuit Court argued that the notes had been examined and made a part of the record by the trial court. (Appellee's Ninth Circuit Brief at 64.) At oral argument, it abandoned this contention and then lodged with the Circuit Court the packet of notes which prosecutor Lebowitz said were all the notes he could then find.

(v) That petitioner had "lengthy, wide-open cross-examination . . . [which was] more than sufficient, *had the jury been inclined to ultimately view the defendant himself as being credible*. . . ." (*Id.* at 67)

Apart from the issue of whether the Government can change theories for withholding the materials[17] which, had they been advanced at trial, petitioner would at least have had an opportunity to refute or clarify, the Government's arguments demonstrated a dismal incomprehension of the plain language, legislative purpose, and this Court's interpretations of the Jencks Act. Nowhere in its brief to the Circuit did the Government ever address itself to petitioner's contention that the trial court refused to inspect the documents, which is required once a defendant demonstrates the existence of possible statements; and, most importantly, apart from the Jencks Act, the Government never refuted petitioner's argument that the prosecutor's notes under the particular circumstances of this case were compellable under *Brady* and its progeny. (*Id.* at 62-67)

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[17]Petitioner submits that it is improper for the Government to withhold production of these notes on one theory, and then on appeal to expressly abandon that theory and assert a new and different basis for nonproduction. *See Bond v. United States*, 397 F.2d 162, 166 (10th Cir. 1968), *cert. denied*, 393 U.S. 1035 (1969); J. Wigmore *Evidence*, §18 (3d ed. 1940). By this switch in theories, the Government denied petitioner the opportunity to make a record in the trial refuting the basis for the theory advanced in the appellate court.

SUMMARY OF THE ARGUMENT

The trial court's ruling held the prosecutor's notes not to be compellable because of an asserted "work product privilege." The Ninth Circuit's ruling was "[a]part from the question whether such notes were exempt from the Jencks Act as work product (18 U.S.C. 3500) they were not statements of the defendant within the meaning of 3500(e)." The trial court looked at none of the notes in arriving at its decision. The Court of Appeals apparently looked at some. Neither the trial court nor the appellate court considered the effect of the *Brady* doctrine and whether because the notes were not produced, regardless if they were a statement or not under the Jencks Act, petitioner was denied his due process right to a fair trial under the Fifth Amendment. Due process embodies the Sixth Amendment guarantees to compulsory process and confrontation, which are particularly called into play in this case because of the unique position of the Government's chief witness, Newman, discussed *infra* at 54-57.

The Government has indicated that it will lodge with this Court the same materials which the prosecutor lodged with the Court of Appeals. If this Court determines that it will review that portion of the attorneys' notes that are lodged and thereafter determines the notes do not constitute statements within the meaning of the Jencks Act, there is still extant the question of whether the notes should have been compelled by the guarantees of the Fifth and Sixth Amendments. As Mr. Justice Frankfurter observed, "Any claim for the exclusion of evidence

logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an overriding public policy expressed in the Constitution or the law of the land."[18] There is no such justification here.

A. Disclosure of the Prosecutors' Notes was Required Under the Jencks Act.

The face of the Jencks Act (18 U.S.C. § 3500) is barren of any "work product" exception to the disclosure requirement enunciated therein. Similarly, the extensive legislative history carries no hint of any Congressional intent to so limit a criminal defendant's access to otherwise producible material. The "detailed particularity" with which Congress set forth the production requirements in the statute, combined with the extensive legislative history, noted by Mr. Justice Frankfurter in *Palermo v. United States*, 360 U.S. 343 (1959), demonstrate that Congress had no intention of creating a work product exception to production of a Government witness' prior statement.

Those federal appellate courts which have had occasion to reach this issue have uniformly rejected any assertion that a work product exception to the Jencks Act exists. Following the lead of Mr. Justice Reed in *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963), these courts have interpreted the statutory command requiring production of statements made by a witness "to an agent of the Government" as including Government attorneys within its scope.

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[18] *Nardone v. United States*, 308 U.S. 338, 340 (1939).

Furthermore, the provisions of the Jencks Act requiring the trial court to inspect and excise from the statement those matters which are irrelevant clearly serve to delimit matters contained in statements that are extraneous to the witness' testimony on direct examination. The existence of the inspection and excision requirement logically negates any inference that otherwise producible statements may be withheld in their entirety. A principal consideration behind the work product doctrine enunciated in *Hickman v. Taylor*, 329 U.S. 495 (1947), was the promotion of attorney preparation to insure the complete representation necessary to the proper functioning of the adversary system. However, the work product privilege is subject to limitations in both civil and criminal contexts. In *United States v. Nobles*, ____ U.S. ____, 95 S. Ct. 2160 (1975), while expressly reserving the question of the limits of the work product doctrine in criminal cases, this Court emphasized that the proper functioning of the adversary system requires disclosure of all facts necessary to the resolution of the issues at trial.

The Jencks Act requires that, once the defense has invoked the statute at the proper time and has demonstrated the existence of arguably compellable materials, it is the *duty* of the trial court to conduct an in camera inspection of that material and, if necessary, take extrinsic evidence necessary to the resolution of the issues of first, whether the material is a statutory statement, and, second, whether it relates to the subject matter as to which the witness has testified. *Palermo v. United States*, 360 U.S. 343, 354-55 (1959).

In the instant case, petitioner demonstrated at the beginning of cross-examination that the prosecutors had

multiple extended interviews with their chief witness, Newman, to discuss his trial testimony; that the prosecutors took notes of what Newman had told them; and that these notes were periodically read back to Newman for verification and correction. Petitioner then made a timely motion for production of the notes for an in camera inspection by the trial judge.

The refusal of the trial court to order production of the materials, inspect the documents, and take evidence concerning the circumstances under which the documents were prepared, despite timely and specific requests on the part of petitioner for both production and inspection, clearly violates the express provisions of the Jencks Act itself, as well as being at variance with the rulings of this Court. *Clancy v. United States*, 365 U.S. 312, 314-16 (1961; *Campbell v. United States* (I), 365 U.S. 85, 92-95 (1961); *Palermo v. United States*, 360 U.S. 343, 354 (1959).

Petitioner was thus foreclosed from any opportunity to build an adequate record to effectuate appellate review of this ruling, to such an extent that the very documents at issue were not even put into the record. The trial court's refusal to comply with expressly mandated procedure thus constituted a substantial abuse of discretion.

The district court's abuse of discretion here falls outside the harmless error rule enunciated in *Rosenberg v. United States*, 360 U.S. 367 (1959). In *Rosenberg*, the trial court made the withheld statement a part of the record and that decision is expressly based on the circumstance that the defense had already received from the prosecution the substantial equivalent of the statements which were erroneously withheld. In the

case at bench, there was no substantial equivalent to the material withheld and there is no real record of what was withheld; further, the withholding was extremely critical as Newman, by virtue of his deal, was under contract with the Government to give a full and complete statement prior to trial and to testify at trial *in conformity* with those pretrial statements. The documents in the prosecutor's possession went directly to the crucial areas of credibility and bias of the principal Government witness. *Davis v. Alaska*, 415 U.S. 308, 317 (1974); *Williams v. United States*, 338 F.2d 286 (D.C. Cir. 1964).

This Court can take no comfort in assuming that it is even examining the full extent of the materials withheld at trial, since at the time they were lodged in the Circuit *dehors* the record, it was over fourteen months after the event and with the prosecutor's observation that these were all he could find. Unless it is perfectly clear that the defense was not prejudiced by the failure to produce Jencks Act statements, the conviction must be reversed. *United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969).

The refusal of the trial court to comply with the terms of the Jencks Act through inspection and disclosure to petitioner of Newman's statements constituted error. Here the Government stated in its brief to the Ninth Circuit (p. 64) that the notes "were often prepared only after lengthy conversations had occurred and a *mutual understanding* of the factual situations had been reached." Whatever else the words "mutual understanding" may mean, there can be no quarrelling with the notion that before the attorneys wrote down what Newman told them, they "correctly

understood" what he said and meant to say. If that doesn't evidence an "adoption" *and* "approval" of the statement within the definition of "statement" as contained in 18 U.S.C. § 3500(e) (1), then nothing does. Since an appellate court is not in a position to determine whether the statements could have been used effectively by petitioner, and since the failure to disclose these statements cannot be cured on appeal, the only effective remedy to petitioner is the reversal of his conviction and the granting of a new trial. *Clancy v. United States*, 365 U.S. 312 (1961); *Palmero v. United States*, 360 U.S. 343 (1959).

B. The Due Process Clause Compels Disclosure of the Prior Statements of the Prosecution's Chief Witness

At trial, petitioner's motion for production was made under the authority of not only the Jencks Act, but also under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Under *Brady*, three separate, yet coordinate constitutional provisions are called into play: the due process clause of the Fifth Amendment, and the compulsory process and confrontation clauses of the Sixth Amendment.

Under *Brady*, prosecutorial suppression of evidence favorable to the accused on either the issue of guilt or punishment violates due process. The prosecution's failure to divulge information which would have impeached a key Government witness has been held to violate due process under the *Brady* rationale. *Giglio v. United States*, 405 U.S. 150 (1972). The fact that the material specifically requested was not made a part of

the record, nor even inspected by the trial judge, leaves room for nothing but doubt as to the possible effects of disclosure. The due process requirement is directed to evidence whose nondisclosure might have harmed the accused; and, in view of the importance of this witness to the Government, the light which this material would have shed on this witness' credibility was absolutely crucial to petitioner. Under such circumstances, the reviewing court is in the same position as was the defendant at trial – not knowing the exact contents of the material withheld because such material was missing from the record of the trial court. *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). The effect of the trial court's acceptance of the prosecution's nonconstitutional claim of work product privilege, without inspection of the requested material, effectuated that claim of privilege solely on the basis of the prosecution's representations and without regard for the petitioner's constitutional rights. The Government cannot be permitted to undertake a criminal prosecution and then invoke a purported privilege to deprive the accused of material relevant to his defense. *United States v. Reynolds*, 345 U.S. 1 (1953). Such a practice, which inhibits the development of all relevant facts, is contrary to both the concept and the needs of the adversary system. *United States v. Nixon*, 418 U.S. 683 (1974).

The concept of due process is a general restatement of those values more specifically enunciated in various provisions of the Bill of Rights, including the compulsory process and confrontation clauses of the Sixth Amendment. The production of all relevant and admissible evidence is an essential duty of the courts to

vindicate those guarantees. *United States v. Nixon*, 418 U.S. 683 (1974).

The compulsory process clause has been recognized as a proper basis for compelling production of impeaching materials for the defense for almost 170 years. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807).

Petitioner sought the aid of the court to compel the prosecutor to produce the documents at trial. The district court's refusal to order the Government to produce these notes and thereafter for the court to make an inspection not only constituted a refusal to exercise its discretion, but also denied petitioner the opportunity to make a complete record for appellate review. Under the circumstances of this case, the judge's refusal to act resulted in a denial of the compulsory process power of the court to petitioner's detriment in violation of the commands of the Sixth Amendment. *United States v. Augenblick*, 393 U.S. 348 (1969); Westen, *The Compulsory Process Clause*, 73 *Mich. L. Rev.* 71 (1974).

Additionally, in refusing to order production of these notes, the trial court denied petitioner his right to meaningfully confront Newman and demonstrate to the jury the true extent not only of Newman's inconsistent statements, but also of his bias and vulnerability to undue pressure from the prosecutors. The object of the Sixth Amendment's confrontation clause is to enable the trier of fact to have a meaningful opportunity to evaluate the credibility of the witness by observing him under personal cross-examination. The physical presence of the witness in court is only one aspect of the right to confrontation – the other is the right to *effective*

cross-examination. *Smith v. Illinois*, 390 U.S. 129 (1968).

Effective cross-examination requires that the witness be placed in his proper setting so that the trier of fact can appraise the weight and credibility of his testimony. This does not require a showing that the cross-examination would discredit the witness; rather, prejudice inures to the defendant from the denial of the opportunity to conduct an effective cross-examination. *Alford v. United States*, 282 U.S. 687 (1931).

In the instant case, petitioner's efforts were directed to not only obtaining evidence of prior inconsistent statements, but also of material in the requested documents which would expose bias, prejudice and ulterior motives of the witness in testifying against petitioner. At trial, petitioner attempted to demonstrate that Newman's imputation of direct responsibility for all illegal acts to petitioner was the product of the witness' desire to obtain the most favorable possible treatment for himself as a co-conspirator. From the description of these documents which the Government gave to the Court of Appeals, it is abundantly clear that had the documents been produced for cross-examination, they would have enabled counsel not only to shed much unfavorable light on the reliability of Newman's narrative on direct, but also to make a record from which to argue to the jury Newman's bias. Thus, the inability of petitioner to place matters relevant to the witness' credibility before the jury constituted a denial of his right to confrontation. *Davis v. Alaska*, 415 U.S. 308 (1974).

The trial court's refusal to compel production of the prosecutors' notes in the particular facts of this case

denied petitioner the fundamental protections guaranteed him by the Fifth and Sixth Amendments. His conviction must be reversed and a new trial granted.

ARGUMENT

I.

THE TRIAL COURT'S SUA SPONTE RULING THAT THE "WORK PRODUCT" PRIVILEGE PRECLUDED DISCLOSURE OF THE PROSECUTORS' NOTES, AND ITS REFUSAL TO CONDUCT AN IN CAMERA INSPECTION, TAKE EXTRINSIC EVIDENCE, AND MAKE THE NOTES PART OF THE RECORD, IS REVERSIBLE ERROR

A. There Is No "Work Product" Exception to the Jencks Act

First, it is clear from the face of the statute that there is no express "work product" exception to the disclosure requirements of the Jencks Act. The Government is affirmatively required:

> "to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

There is no qualification to this command which can be said even to imply the existence of a work product exception.

Second, the legislative history of the Jencks Act cannot support the concept of a work product exception. As originally enacted, the disclosure requirements pertained to any statement made "to an agent of the Government" (Act of Sept. 2, 1957, Pub. L. No. 85-269, 71 Stat. 595, *codified as* 18 U.S.C. § 3500(a)). There is nothing in that history which so much as suggests that "an agent of the Government" necessarily excludes Government attorneys. *See* 1957 *U.S. Code Cong. & Admin. News* 1861. The 1970 amendment which deleted the words "to an agent of the Government" was neither intended to exclude attorneys from the disclosure requirement of the statute, nor to otherwise limit it. Rather, the amendment was made to expand the scope of the disclosure requirements to include grand jury minutes. *See* Act of Oct. 15, 1970, Pub. L. No. 91-452, Title I, § 102(a), 84 Stat. 922; 1970 *U.S. Code Cong. & Admin. News* 4007, 4017.

As Mr. Justice Frankfurter noted with respect to the legislative history of the Jencks Act:

> "In almost every enactment there are gaps to be filled and ambiguities to be resolved by judicial construction. This statute is not free from them. Here, however, the detailed particularity with which Congress has spoken has narrowed the scope for needful judicial interpretation to an unusual degree. The statute clearly defines procedures and plainly indicates the circumstances for their application. *Palermo v. United States*, 360 U.S. 343, 349 (1959).

Petitioner submits that this "detailed particularity," in conjunction with the not insubstantial legislative history, render it inappropriate for a court to "read into" the Jencks Act exceptions to production not clearly enunciated therein.

Third, as the Government conceded in its brief to the Ninth Circuit (p. 64), it is also clear that those

appellate courts which have had occasion to reach this question have uniformly rejected the assertion that any work product exception to the Jencks Act exists.[19]

It is significant that *Jencks v. United States*, 353 U.S. 657 (1957), the progenitor of the Jencks Act, contains no reference to a work product exception which might be construed as an internal limitation on that holding. Furthermore, *Palermo v. United States*, 360 U.S. 343 (1959), the first case in which this Court had occasion to construe the Jencks Act, contains an extended discussion of the purposes, parameters, and legislative history of the Jencks Act, yet is utterly silent on the matter of a work product exception.

Fourth, the provisions of the Jencks Act requiring the trial court to inspect the witness's statement and excise those portions which are not relevant (18 U.S.C. § 3500(c)) must necessarily be intended to replace the concept of a separate work product privilege. *See* Note, *"Work Product" in Criminal Discovery*, 1966 *Wash. U.L.Q.* 321, 328 (1966). Since the purpose of the excision requirement is to delete irrelevant materials or portions of the statement which do not substantially reflect the statements of the witness, and since an attorney's personal notations on such matters as the witness' credibility or that another witness does or does not corroborate the first witness's version are clearly not part of the witness's statement, the protection afforded by the trial court's in camera inspection clearly replaces a blanket work product privilege. The existence of the excision requirement logically negates any inference that otherwise producible statements may be withheld in their entirety. Since for the purpose of this case we must assume that the prosecutors' notes were in fact Jencks Act "statements" (for, if they were not compellable statements, there would be no logical reason for the prosecutors to have asserted work product in response to petitioner's request), it follows that the proper remedy for the Government would have been to request excision of those portions of the statement which reflect the attorneys', rather than the witness', thoughts.

Fifth, the work product doctrine enunciated in *Hickman v. Taylor*, 329 U.S. 495 (1947), to limit *pretrial discovery* in civil cases, is subject to exceptions even in the civil context. *Hickman v. Taylor* concerned a contempt proceeding arising from a refusal to comply with a discovery order in a wrongful death action. This Court characterized the use of the discovery process there as

> "an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Forten-

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[19] *United States v. Smaldone*, 484 F.2d 311, 317 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) ("We recognize that there is no work product exception as such"); *United States v. Hilbrich*, 341 F.2d 555, 557 (7th Cir. 1965) ("There is no 'work product' exception to the Jencks Act. If a statement taken or recorded by government counsel falls within the definition of the Act, it must be produced"); *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963) (Per Mr. Justice Reed: "[T]he statute applies to statements made by a witness to 'an agent of the Government,' and there is nothing in the statute which necessarily excludes government attorneys from its scope"); *United States v. Aviles*, 315 F.2d 186, 191 (2d Cir. 1963) ("[The Jencks Act] makes no distinction among statements on the basis of the purpose for which they were recorded or the type of government agent to whom they were made").

> baugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice." *Id.* at 509.

This Court held that such a use of the discovery process was not contemplated by the Federal Rules of Civil Procedure and was against public policy as tending to impair the quality of legal preparation done by counsel. However, all this was stated subject to the following caveat:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents .... might be useful for purposes of impeachment or corroboration." *Id.* at 511.

This exception to the work product doctrine, imposed even in civil cases (*see Fed. R. Civ. P.* 26(b)(3)), is reflected in a multitiude of ways in the criminal context. Thus, Rule 16 of the Federal Rules of Criminal Procedure, the Jencks Act, and the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), all reflect facets of an altogether different standard imposed in criminal cases. *See Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts*, 62 F.R.D. 271, 309-14 (1974); Note, *"Work Product" in Criminal Discovery*, 1966 *Wash. U.L.Q.* at 334-44.

This Court recently had occasion to discuss the application of the work product doctrine in criminal cases in *United States v. Nobles*, ____ U.S. ____, 95 S.Ct. 2160 (1975). Writing for the majority, Mr. Justice Powell noted that the work product doctrine's "role in assuring the proper functioning of the criminal justice system is even more vital" than in the civil litigation context. *Id.* at 2170. However, this Court found that "the privilege derived from the work-product doctrine is not absolute [but] like other qualified privileges it may be waived." *Id.* This Court thus approved the trial judge's requiring production for the Government's inspection of a defense investigator's contemporaneously recorded interview reports which "preserved the essence" of the investigator's pretrial conversations with two prosecution witnesses, as a precondition to allowing the investigator to testify in rebuttal. While the opinion expressly reserved the question of the limits of the work product doctrine in criminal cases, the policy comments are pertinent here.

> "[The District Court] merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.* at 2171.

In the context of the case at bench, the application of *Nobles* is clear. *Nobles* found a duty to disclose at the time of trial the contents of what this Court

recognized as work product, despite the Sixth Amendment issue (absent here), in the absence of an express statutory policy requiring disclosure (in the instant case, the Jencks Act), and without expressly requiring the formal safeguards inherent in the Jencks Act definition of a "statement" (18 U.S.C. § 3500(e)).

Under these circumstances, Mr. Justice Reed's observation twelve years ago remains persuasive:

> "It may be true that the work product rule reflects considerations other than maintaining the privacy of an attorney's thoughts and trial tactics. [Citation omitted.] However, we find no rationale for withholding a witness' statement in the prosecutor's hands which satisfies the Jencks Act requirements, which is sufficient to overcome the Jencks decision and statute." *Saunders v. United States*, 316 F.2d 346, 350 n.3 (D.C. Cir. 1963).

In light of the considerations and authorities set forth above, it is clear that this case is appropriate for the exercise of

> "the federal judiciary's inherent power to require the prosecution to produce previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced." *United States v. Nobles*, 95 S.Ct. at 2166.

Petitioner therefore submits that there exists no work product doctrine applicable to bar production of a Government witness' prior statements in the face of a defense Jencks Act demand, and the trial court's holding to the contrary was therefore plain error.

B. The District Court Erroneously Denied Petitioner's Request For An In Camera Inspection Of The Prosecutor's Notes

The command of the Jencks Act is unambiguous. After a Government witness has testified on direct examination,

> "the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . .
>
> "If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. . . ." 18 U.S.C. § § 3500(b), (c).

In order to compel production of statements in the prosecution's possession, "the burden rests on the defendant to invoke the statute at the appropriate time." *Ogden v. United States*, 303 F.2d 724, 733 (9th Cir. 1962). However, "[r]elevancy and materiality for the purpose of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness." *Jencks v. United States*, 353 U.S. at 669. At trial, petitioner established that Newman had multiple extended interviews with the Government attorneys to discuss his trial testimony; that the Government attorneys took notes of what the witness told them; and that these notes were periodically read back to the witness for verification and correction. Petitioner then

made a timely motion for production of the notes for in camera inspection by the trial judge and a sufficient showing of relevancy and materiality to compel production.

This Court has made it clear that to meet the requirements of § 3500(e) (1), the "statement" need not have been signed by the witness, nor written by him, nor even be a substantially verbatim recording of a prior oral statement. *Campbell v. United States* (II), 373 U.S. 487, 492 n.6 (1963). "[T]he witness may adopt or ratify an interview report in a piecemeal manner by response to a number of inquiries as effectually as by a single generalized response." *United States v. Scaglione*, 446 F.2d 182, 184 (5th Cir. 1971), *cert. denied*, 404 U.S. 941 (1971). Here Newman admitted that the notes were read back to him and that he would either correct or confirm the prosecutors' record of what was said, thus insuring that the summary did not materially vary from the witness' account. Thus, petitioner made a sufficient showing to compel production to at least the trial court for its inspection.[20] *See Palermo v. United States*, 360 U.S. at 350; *United States v. Chitwood*, 457 F.2d 676, 678 (6th Cir. 1972), *cert. denied*, 409 U.S. 858 (1972).

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[20]Newman's equivocation on cross-examination as to the extent to which the notes were read back to him may properly be laid to his self-interest in not associating himself too closely with potentially impeaching prior statements. As this Court noted in *Campbell v. United States* (I), 365 U.S. 85, 98 (1961), it is improper for a defendant to be "deprived of the opportunity to make use of the report by the obviously self-serving declarations of the witness that it did not accurately record what he told the agent."

It cannot be said that a defendant must establish an air tight case that particular documents are Jencks Act statements merely to gain an in camera examination by the trial court, "because the defendant often does not and cannot know whether any such statement exists." *Saunders v. United States*, 316 F.2d at 349. "The Court and the defendant must grope; only the government knows the content of its own files." *Ogden v. United States*, 303 F.2d at 733. Moreover,

> "the statute does not vest in the Government the unilateral power to determine without judicial supervision a controverted question between the parties concerning whether a document in the possession of the Government constitutes a statement within the purview of the statute. . . ." *Bary v. United States*, 292 F.2d 53, 58 (10th Cir. 1961).

Under the circumstances of the case at bench, it is evident that this foundation and petitioner's subsequent motions for production

> "impose[d] on the trial judge an affirmative duty to conduct a non-adversary hearing, out of the presence of the jury, to ascertain whether documents in the possession of the Government [were] Jencks Act statements." *United States v. Chitwood*, 457 F.2d at 678.

See Campbell v. United States (I), 365 U.S. 85, 95 (1961); *Saunders v. United States*, 316 F.2d at 349; *Ogden v. United States*, 303 F.2d at 733.

This Court first approved the in camera inspection of the contested documents by the trial court in *Palermo v. United States*, 360 U.S. 343 (1959).[21] In conjunction

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[21]"[W]hen it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the

with the in camera inspection, "[a]n affirmative duty is placed upon the trial court to secure the information which is necessary to a proper ruling on particular requests for production in light of the statutory purposes. . . ." *Ogden v. United States*, 303 F.2d at 733.

The cases noted *supra* have thus recognized the need for two separate but related actions:

(i) Submission of the statements for inspection by the trial court; and

(ii) The taking of evidence concerning the circumstances under which the statement was prepared.

Despite the three requests on the part of petitioner for production, as well as the specific requests for an in camera examination of the notes by the trial judge, no production was ever made by the prosecution nor was any inspection performed by the court. Such an omission was clearly contrary to the express provisions of the Jencks Act itself (18 U.S.C. § § 3500(b), (c)), as well as being at variance with the rulings of this Court. *Clancy v. United States*, 365 U.S. at 92-95; *Palermo v. United States*, 360 U.S. at 354.

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statement to the trial judge for an in camera determination. Indeed, any other procedure would be destructive of the statutory purpose. . . .

"It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. . . ." 360 U.S. at 354-55.

Accord, Campbell v. United States (I), 365 U.S. 85, 92-96 (1961).

The net result of the trial court's error was to foreclose any opportunity for petitioner to build an adequate record to effectuate appellate review of this decision. With the exception of those few details which counsel was able to elicit from Newman on cross-examination, the record is virtually barren of credible evidence as to the exact nature and contents of the notes. The fact that the Government subsequently tendered *some* notes to the Court of Appeals does not remedy matters, for the issue of the completeness of those notes aside, petitioner submits that a

> "[d]etermination of the question whether the Government should be ordered to produce government papers could not be made from a mere inspection of the [documents], but only with the help of extrinsic evidence." *Campbell v. United States* (I), 365 U.S. at 92-93.

Furthermore, petitioner is unable to understand how an appellate court can be expected to review the ruling of a trial court for abuse of discretion when the appellate court is presumably the first tribunal to have before it *some* of the very material which was essential to the exercise of that discretion, and the trial court has made no findings of fact because it has taken no evidence.

For the reasons detailed above, the trial judge's failure to conduct an in camera examination of the notes here at issue constitutes reversible error *per se*. *Campbell v. United States* (I), 365 U.S. at 92-93; *Palermo v. United States*, 360 U.S. at 354.

C. The Failure of the Trial Court To Examine and Disclose to the Defense the Witness' Statements Was Prejudicial Error Requiring a New Trial.

The application of the harmless error doctrine in connection with the failure to produce Jencks Act statements was first discussed by this Court in *Rosenberg v. United States*, 360 U.S. 367 (1959), where the error of the trial court in not making a producible statement available was held to be harmless. The statement there in question was a letter written prior to trial by the witness to the Assistant U.S. Attorney, stating that her memory of the events was fading and that she required the opportunity to refresh it by rereading the text of her original statement to the FBI.[22] The sole subject in the statement in *Rosenberg*, therefore, was the fact of loss of recollection. The Court stated:

> "[T]he same information which was contained in the letter was revealed to defendant's counsel by statements made by [the witness] under cross-examination and upon questioning by the trial judge." *Id.* at 370.

The case at bench, however, far more closely resembles the situation with which the Court was confronted in *Williams v. United States*, 338 F.2d 286 (D.C. Cir. 1964). In *Williams*, as in the instant case, the critical issue for the defense was the credibility of the principal prosecution witnesses who told stories which

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[22]The letter was made a part of the record by the trial judge and thus available for effective appellate review.

sharply conflicted with that told by the defendant. The court reasoned:

> "The issue of credibility of the witnesses for the defense vis-a-vis those for the prosecution was important. Defendant took the stand and gave quite a different version from that given by Butler and Smith of the events which led to his indictment. . . . If believed this version of the affair might have persuaded the jury that Butler . . . was not to be believed, and that the facts did not require conviction of defendant. We do not intimate that the jury would have so concluded. If there were discrepancies between the statements and the testimony of Butler and Smith given at the trial, as we find to be the case, then the failure to make the statements available to defense counsel deprived him of the right effectively to conduct the defense as contemplated by the Jencks rule. . . .
>
> "The issue is whether counsel should have had the choice of using the statements to test the witness' credibility; that is, in the present context, to test whether the witnesses gave true accounts of what occurred." *Id.* at 290 (footnote omitted).

The Court concluded that under these circumstances the error in denying the request of the defense for production of the statements could not be harmless.

The testimony of Newman at trial far exceeded in both detail and scope the sworn statement taken on May 11, 1973. (*See* pp. 15-18, *supra*.) There was no substantial equivalent to Newman's statements to the prosecutors, as there was in *Rosenberg*. Furthermore, as in *Williams*, the credibility of Newman as the principal Government witness was the key to the prosecution's case, and Newman was subject to prosecutorial

pressures, since he was seeking to render all assistance possible to curry the Government's favor. *Cf. Davis v. Alaska*, 415 U.S. 308, 320 (1973). In such circumstances, the argument that no prejudice inured to the defendant through the nonproduction of the statements can only be based on a series of assumptions regarding the potential effectiveness of cross-examination which neither the prosecution nor the court is qualified to make.[23]

Whether or not the prosecutor's notes were appropriate for use for impeachment is not a question whose resolution rests unilaterally with the Government. *Bary v. United States*, 292 F.2d at 58. Similarly, it is not for the courts, especially the appellate courts, to look at a cold record and speculate whether these statements could have been used effectively. *Clancy v. United States*, 365 U.S. at 316. "[W]hether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself." *Scales v. United States*, 367 U.S. 203, 258 (1961). One court has held that because the Jencks Act is designed to insure for a defendant the constitutional guarantee of effective confrontation of Government witnesses:

> "Violations of the statute are necessarily attended by the danger that this precious right will be impaired. For this reason, and also because it is ordinarily difficult upon review of a cold record to ascertain the value to the defense of a statement withheld, violation of the Act is excused only in extraordinary circumstances. [Citations omitted.] *Unless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated.*" *United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (emphasis added).

Accord, United States v. Cleveland (I), 477 F.2d 310, 316 n.9 (7th Cir. 1973); *United States v. Aaron*, 457 F.2d 865, 869 (2d Cir. 1972).

The current application of the *Rosenberg* "harmless error" rule puts defense counsel in the anomalous position of attempting to argue on appeal that the denial of the right to inspect the producible statements in issue at trial was prejudicial, without having allowed counsel to make an informed preparation of his argument by reference to those documents. As a result, the shoe is on the wrong foot. As suggested in *Missler, Aaron,* and *Cleveland* (I), *supra*, the burden should rest on the Government to show that the defense was not prejudiced by the omission, and unless that burden is met, the judgment should be reversed and a new trial ordered. These considerations are discussed at length in both *Erckman v. United States*, 416 U.S. 909 (1974) (Marshall & Brennan, J.J., dissenting from denial of certiorari), and *Rosenberg v. United States*, 360 U.S. at 373-77 (1959) (Brennan, J., dissenting).

The contention by the Government in the Circuit court to the effect that the error in refusing to produce the statements was harmless because the statements were inadmissible as evidence is clearly incorrect. The admissibility of the statements is not properly an

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[23]This Court recognized almost twenty years ago that direct contradiction was not the only test of inconsistency, but that omissions, changes in emphasis, and rearrangement of the order of treatment may also contribute to a test of credibility on cross-examination. *Jencks v. United States,* 353 U.S. at 667.

issue,[24] for "the producibility of statements under the Jencks Act and their admissibility under the rules of evidence are separate questions." *Campbell v. United States* (II), 373 U.S. at 493 n.7.

The Government also raised the contention in the Ninth Circuit that because petitioner's cross-examination of Newman was "more than sufficient," and "those statements given by Newman under oath" (the May 11, 1973, transcript) and "to investigative agents" (a Postal Inspector's Report made many years prior) were disclosed, therefore the claim of prejudice is without merit. Appellee's Ninth Circuit Brief at 67. In support of this contention the Government cited *Rosenberg, United States v. Smaldone*, 484 F.2d 311, 318 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974), and *Government of the Virgin Islands v. Lovell*, 410 F.2d 307, 310-11 (3d Cir. 1969), *cert. denied*, 396 U.S. 964 (1969).

As has been noted above, *Rosenberg* set forth the "harmless error" rule in Jencks Act cases where the defense already possessed "the very same information" (360 U.S. at 371) and the prior statement had the potential to impeach on only one subject. However, the case at bench

> "is not a case in which the statement erroneously withheld from the defense merely duplicated information already in the defense's possession; it

[24] As Mr. Justice Frankfurter noted:

> "Of course the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration. Neither is it significant whether or not the statement is admissible as evidence." *Palermo v. United States*, 360 U.S. at 353 n.10.

> is not a case in which the witness' testimony was unimportant to the proofs necessary for conviction; and it is not a case in which the witness' statement was wholly void of possible use for impeachment." *Id.* at 376-77 (Brennan, J. dissenting).

Lovell also found the erroneous failure to disclose to be harmless error in a situation where preliminary hearing testimony and a signed, inconsistent statement to defense counsel's own law clerk were both available to the defense and revealed the same information as was withheld. 410 F.2d at 310-11. While both *Rosenberg* and *Lovell* offer only inferential support to the Government's position, *Smaldone* can be viscerally construed as saying that extensive cross-examination is an adequate substitute. However, a careful reading of *Smaldone* reveals that the thrust of the opinion was that the notes involved therein were not statutory "statements" at all, and petitioner submits the discussion of harmless error was only a make-weight. Even at that, the principal emphasis in the discussion of harmless error is the fact that the defense had already received several detailed prior statements of the witnesses, including a probation report which did not fall under the Jencks Act, and the notes in question covered but a single two-hour conversation. 484 F.2d at 316-18.

Furthermore, taken as the Government urged below, *Smaldone* enunciates a most dangerous concept, *viz.*: that extensive cross-examination of a witness can cure otherwise reversible errors in a criminal trial. What the Government has argued boils down to the position that, by conducting a searching cross-examination of a

Government witness, the defendant in effect waives[25] the right to challenge what would otherwise be prejudicial error on the part of the prosecutor or court. But that waiver argument is no more than sheer sophistry, which flies in the very teeth of the Sixth Amendment's confrontation clause. *See* discussion at pp. 69-72, *infra*. Yet the Government's interpretation of *Smaldone* would restrict the exercise of the right of cross-examination by throwing a criminal defendant into the "Hobson's Choice" of having to choose between the alternatives of attempting to vigorously cross-examine the key witness with the information available, knowing that the Government has failed to produce all of the materials which it is obligated to produce; or, abandoning the cross-examination on the basis of a speculative appraisal of what an appellate court may do as a result of the failure of the Government to comply with the commands of the statute. As this Court noted nearly forty-five years ago:

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." *Alford v. United States*, 282 U.S. 687, 692 (1931).

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[25]"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). As this Court said in the context of another Sixth Amendment right in *Carnley v. Cochran*, 369 U.S. 506, 516 (1962):

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Accord, Smith v. Illinois, 390 U.S. 129, 132 (1968). Such a choice cannot be forced upon a criminal defendant by a court which "has been zealous to protect these rights from erosion." *Greene v. McElroy*, 360 U.S. 474, 497 (1959).

Petitioner thus submits that it is "clearly incompatible with our standards for the administration of criminal justice in the federal courts" (*Jencks v. United States*, 353 U.S. at 668) to condition the effective enforcement of the statutory right guaranteed a criminal defendant under the Jencks Act on the ineffectiveness of the exercise of his right of cross-examination under the Sixth Amendment.

For the reasons enunciated above, the refusal of the trial court to comply with the terms of the Jencks Act and turn over the statements of the witness Newman to petitioner constituted error. As this Court stated in finding prejudicial error requiring a new trial in *Clancy v. United States*, 365 U.S. at 316:

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

Because the failure to turn over these statements cannot be cured on appeal, it follows that the only remedy available to petitioner is the reversal of his conviction and the granting of a new trial.

II.

THE TRIAL COURT'S REFUSAL TO COMPEL DISCLOSURE OF MATERIAL RELEVANT TO THE PROSECUTION'S CHIEF WITNESS VIOLATED PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS.

The Jencks Act aside, there are three constitutional bases upon which the notes should have been examined by the trial court and produced for petitioner: the due process clause of the Fifth Amendment; the compulsory process and the confrontation clauses of the Sixth Amendment.[26] They are uniquely called into play in the case at bench because:

(i) Newman was the key Government witness and, pursuant to his plea agreement, required to give a

[26]While neither the compulsory process nor confrontation clause was explicitly urged by petitioner as grounds for production of the notes in the courts below, these are subsumed within the claims for the notes under the due process grounds of *Brady*. *United States v. Nixon*, 418 U.S. 683, 711-13 (1974). "[I]dentical grounds may often be supported by different legal arguments, or be couched in different language, or vary in immaterial respects. Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Saunders v. United States*, 373 U.S. 1, 16 (1963) (citations omitted). Whether the issue here is viewed as a due process issue or a compulsory process or confrontation issue (and different courts have viewed the matter differently), the relief sought is and was in the courts below precisely the same. Further, under *Fed. R. Crim. P.* 52(b), appellate courts have the authority to consider "plain errors affecting substantial rights," especially those of constitutional dimension, even though not pressed in the court below. *Alexander v. United States*, 390 F.2d 101, 103 n.3 (5th Cir. 1968). *See Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941); *accord, Curtis Publ. Co. v. Butts*, 388 U.S. 130, 145 (1967).

complete statement concerning his knowledge and involvement in the circumstances surrounding the indictment; (Ap. 48)

(ii) Newman was likewise required by that agreement to *testify* at trial *in conformity* with the *complete statement* which he gave; (Ap. 48)

(iii) The complete statement was necessarily comprised of two parts, *viz.*, the May 11 reported statement; and those notes of the prosecutors prepared during those 40 hours of meetings which preceded Newman's direct testimony and which "were often prepared only after lengthy conversations had occurred and a *mutual understanding of the factual situation had been reached.*" (Government's brief to the Circuit, p. 64)

(iv) At the same time petitioner was seeking to obtain the prosecutors' notes of what Newman told them, petitioner was also seeking to determine the full extent of Newman's bargain and whether it was other than Newman testified and as portrayed in the agreement, *viz.*, that he would be pleading to one count of the outstanding indictment.[27]

[27]Newman at trial denied that he would be permitted to plead to other than a felony count of the indictment. (Ap. 82, 95) As part and parcel of the motion to examine the attorneys' notes, on the authority of *Brady* and *Giglio*, petitioner also sought to have the prosecutors disclose whether there were any conversations or side agreements with Newman. (Ap. 55-56) The court did *not* order the Government to respond. (Ap. 99) The motions were denied; the Government produced nothing. (Ap. 98-100) The prosecutor in final argument told the jury that Newman had no option to plead to a misdemeanor, that there was no deal with Newman to let him plead to a misdemeanor, and that any suggestion by petitioner's counsel to the contrary was his

(v) Although Newman's statements were supposed to be sworn to and "on the record," the Government took the precaution of insuring that these meetings (at least five subsequent to the May 11th meeting) would be "off the record", and that they would thus not result in sworn statements which clearly could be used by the defense for impeachment. The Government obviously was seeking to protect whatever Newman told them or whatever they told him which resulted in their arriving at "mutual understandings" from discovery by petitioner.[28]

The Government's portrayal of Newman before the jury was one of a contrite, remorseful man who had confessed all, now had nothing to hide and was willing to take his punishment by pleading guilty to one of the fourteen counts in the indictment. The thrust of Newman's testimony was to cast himself as an individual without free will who, while with FSL was under the total domination and control of petitioner.

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imagination. (R.T. 0259) Nonetheless, ten weeks after petitioner was sentenced, the indictment against Newman was dismissed. (Ap. 32) And, in fact, Newman was allowed to plead guilty to two misdemeanor tax violations and placed on probation. (C.T. 546, 579-80)

[28]In a separate but related effort to protect Newman from impeaching sources, the prosecutor engaged in a maneuver which the trial court found to be "highly improper." (R.T. L296) After Newman signed his "agreement," the prosecutor threatened that if a defense witness, Mr. Schwartz, testified, there was a significant possibility that he would be indicted. (R.T. L259-60) Schwartz, a lawyer for FSL, had dealt extensively with Newman, and was the only other person besides petitioner in a position to refute Newman's testimony. Schwartz initially refused to testify (R.T. L291), until at the direction of the court he was granted immunity. (R.T. L296-97)

In the process of his testimony on direct examination–indeed, on cross, redirect and rebuttal–Newman directly attributed, explained and tied in all of the claimed illegalities of FSL's operations and responsibilities for matters alleged in the indictment directly to petitioner, thus shifting the responsibility for the illegal activities from his shoulders to those of petitioner.[29]

Under these circumstances there is no denying that the Government had its key witness in a truss. The value of any variances between what Newman said to the prosecutors and what he said on the witness stand was of paramount concern to petitioner and were matters which petitioner had an absolute right to bring to the attention of the jury. Further, had petitioner known the full extent of what Newman was doing for the Government (as explained in Appellee's Ninth Circuit Brief at 63-65 and footnote 29, *supra*), it would have materially assisted petitioner in demonstrating Newman's bias and vulnerability to undue pressure from the Government.

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[29]In its brief to the Ninth Circuit, the Government explained Newman's role, in addition to his testimony, during those 40 hours of "unreported" conferences as follows:

> "Newman, in fact, did far more than answer questions. He helped the government attorneys in drafting questions to be asked of him and of other witnesses. He helped suggest certain areas of cross-examination to be covered in the event that Goldberg ultimately testified. He explained or made sense out of an almost endless number of letters, documents and other pieces of physical evidence. In many respects, Newman effectively educated the prosecution in the short time available as to the significance of the every day operations of FSL, as well as providing invaluable insight into the personality and past history of Philip Goldberg." (Appellee's Ninth Circuit Brief at 63-64).

A. The Due Process Clause Requires Production of Impeaching Documents and Materials in the Prosecutors' Possession.

In the trial court, petitioner specifically grounded his request for these notes upon the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, *Giles v. Maryland*, 386 U.S. 66 (1967), and *Giglio v. United States*, 405 U.S. 150 (1972).

In *Brady*, this Court held:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." 373 U.S. at 87.

This Court stated the unfairness–and hence the violation of due process–inherent in the suppression of exculpatory evidence stems from the prosecutor's role in helping to "shape a trial that bears heavily on the defendant" (*id.* at 88); and stressed both the affirmative duty of the prosecutor to insure that criminal trials are fair and harm caused to defendants when prosecutors fail to meet this obligation. In *Giles v. Maryland*, 386 U.S. at 98, Mr. Justice Fortas, concurring, observed that:

> "No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."

Justice Fortas pointed out that while not all information, if withheld, created prejudicial error, in *Giles*, petitioners had sought "information [which] was

specific, factual and concrete, although its implications may be highly debatable," and that the information withheld went directly to petitioners' defense. *Id.* at 98-99. He found that the error there could not be harmless.

Subsequently, in *Giglio v. United States*, this Court held that a defendant's right to due process under the *Brady* rationale was violated where events which would have impeached a key Government witness were not disclosed to the defense, stating:

> "When the 'reliability of a given witness may well be determinative of guilt or innocence' nondisclosure of evidence affecting credibility falls within this general rule." 405 U.S. at 154.

In *Giglio*, the Court observed that the witness, Taliento, was the key witness, and that "Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it." *Id.* at 154-55.

Similarly, then-Circuit Justice Thurgood Marshall's insightful analysis of *Brady* in *United States v. Wilkins*, 326 F.2d 135 (2d Cir. 1964), revealed a duty on the part of the prosecution to make disclosure of exculpatory evidence even in the absence of a defense request, "as an ingredient of due process." *Id.* at 137-38. Holding that non-disclosure of the existence of witnesses who would have testified that the defendant was not the person involved in the charged robbery was grounds for granting habeas corpus relief, Justice Marshall said:

> "We cannot speculate as to the effect this testimony would have had on the jury if it had an

opportunity to hear it. The jury was denied that opportunity by virtue of the prosecution's failure to acquaint defense counsel and the trial judge with the names of the witnesses. In the circumstances of this case, that denial was inconsistent with proper standards of fairness, and constituted the judgement of conviction a denial of due process of law." *Id.* at 140.

An analogous problem to that with which petitioner is faced in the case at bench was discussed by the District of Columbia Circuit in *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). The issue there was whether recordings of conversations between the appellant and undercover agents, allegedly concerning narcotics, were sufficiently vital to the defense for their nonproduction at trial to create prejudicial error. The alleged "loss" of the tapes by the Government in *Bryant* put the reviewing court in the same position as petitioner is in here—not knowing what the exact contents of the material were because the record from the trial court was missing the material relevant to a decision.

> "There is not simply 'substantial room for doubt,' but room for nothing except doubt as to the effect of disclosure. What we do know is that the conversations recorded on the tape were absolutely crucial to the question of appellants' guilt or innocence. That fact, coupled with the unavoidable possibility that the tape might have been significantly 'favorable' to the accused, is enough to bring these cases within the constitutional concern. If the due process requirement is directed to evidence whose non-disclosure 'might' have harmed the accused, its purpose clearly reaches the type of missing evidence at issue here. Were *Brady* and its progeny applicable only when

> the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal. The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government." *Id.* at 648.

Certainly any materials which would have permitted petitioner to show that Newman was making statements to the prosecutors inconsistent with his trial testimony, or giving a different emphasis to the same facts would have been relevant to the cross-examining process for testing Newman's credibility. As this Court said in *Jencks v. United States*, 353 U.S. at 667:

> "Flat contradictions between the witness's testimony and the version of events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness's trial testimony."

The logical conclusion to be drawn from these considerations is that reached by the trial court in the habeas corpus case of *Coleman v. Maxwell*, 273 F. Supp. 275 (S.D. Ohio 1967). Although the court found the error in withholding the evidence at issue to have been harmless, it admonished prosecutors that:

> "In view of the fact that the due process clause is violated by both guileful and guileless suppres-

> sion, what is required is an enlightened approach by prosecutors to turn over, on request, statements of witnesses who have testified on behalf of the prosecution which are relative to the subject matter of such testimony. . . ." *Id.* at 280-81.

The need for this "enlightened approach" is demonstrated by the existence of an interface between the constitutional safeguards of the due process clause and the various statutory provisions dealing with pretrial (*Fed. R. Crim. P.* 16) and at-trial (Jencks Act) disclosure of certain material.

While the *Jencks* decision rested on nonconstitutional grounds (the supervisory power of the Supreme Court over the federal judiciary), "it would be idle to say that the commands of the constitution were not close to the surface of this decision." *Palermo v. United States*, 360 U.S. at 362-63 (Brennan, J., concurring). It was therefore inevitable that the due process foundation for the line of cases dealing with suppression of evidence,[30] which found full flower in *Brady v. Maryland* should be explicitly related to the Jencks Act series of cases. Thus, in *United States v. Wright*, 489 F.2d 1181, 1192 (D.C. Cir. 1973), it was observed:

> "The due process clause of the constitution imposes an affirmative duty on the government to reveal evidence helpful to the defense. *Brady v. Maryland* [citation omitted]. The Jencks Act is only one aspect of this duty. *See Jencks v. U.S.* [citation omitted]."

It has also been suggested that where the Jencks Act denies access to information that must be disclosed

[30] *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959).

under the *Brady* rule, the Jencks Act must stand aside. Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 *U. Chi. L. Rev.* 112, 119-20 (1972). When the limitations on disclosure in the Jencks Act, which are designed to promote nonconstitutional values relating to the functioning of the adversary system in criminal trials, infringe upon the effectuation of rights of constitutional dimension guaranteed a criminal defendant under *Brady v. Maryland*, due process requires that the nonconstitutional purposes give way to the vindication of the constitutional rights. The due process clause requires that the Government seek to bring about the nonconstitutional ends in a manner that will be the "least restrictive" of or "least intrusive" on the defendant's exercise of constitutional rights at trial. *Cf.* Ratner, *The Function of the Due Process Clause*, 116 *U. Pa. L. Rev.* 1048, 1063-68 (1968). Thus, the interposition of a work product objection, which has no constitutional basis, let alone a statutory basis, is similarly ineffective to bar production of material which must be disclosed under *Brady*. *Cf. Dennis v. United States*, 384 U.S. 855, 873 (1966): "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecutor to have exclusive access to a storehouse of relevant facts."

The Government not only "prosecutes an accused, [but] also has the duty to see that justice is done." *United States v. Reynolds*, 345 U.S. 1, 12 (1953). Therefore, ". . . it [would be] unconscionable to allow it to undertake prosecution and then invoke its . . . privileges to deprive the accused of anything which might be material to his defense . . ." *Id.*

At the core of this case is the proposition recently enunciated by this Court that "[t]he need to develop

all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. at 709. Petitioner therefore submits that in those instances where materials are in the hands of the prosecutors, which are not technically statements within the meaning of 18 U.S.C. §3500(e), but nonetheless are favorable to the defense in that they will assist in the impeachment of a major Government witness, upon timely demand these materials must be disclosed. *Brady v. Maryland, supra; Giglio v. United States, supra. Cf. Flores v. Craven*, 503 F.2d 1030, 1031 (9th Cir. 1974); *United States v. Ahmad*, 53 F.R.D. 186, 193 (M.D. Pa. 1971). *See also Levin v. Clark*, 408 F.2d 1209, 1210-12 (D.C. Cir. 1967).

B. The Compulsory Process and Confrontation Clauses Require Production of Impeaching Materials in the Prosecutors' Possession Upon Timely Demand.

The disclosure of material which will assist in impeaching a Government witness's testimony after timely demand has been made by a defendant is a right which flows not only from the due process clause but also the compulsory process and confrontation clauses of the Sixth Amendment.[31]

[31] Mr. Justice Black, concurring in *Williams v. Florida*, 399 U.S. 78, 112-13 (1970), stated:

> "[W]hen a question concerning the constitutionality of some aspect of criminal procedure arises, this Court must consider all those provisions and interpret them together. The Fifth Amendment . . . is not an isolated, distinct provision. It is part of a system of constitutionally required procedures, and its true meaning can be seen only in light of all those provisions. 'Strict construction' of the words of the Constitution does not mean that the Court can look only to one phrase, clause, or sentence in the Constitution and expect to find the right answer. Each provision has a clear and definite meaning, and various provisions considered together may have an equally clear and definite meaning."

The commands of the Sixth Amendment's requirements of confrontation and compulsory process are fundamental to our traditions of due process, as this Court held in *Washington v. Texas*, 388 U.S. 14, 19 (1967), wherein it invalidated a Texas statute that prohibited an accomplice from testifying on behalf of a co-defendant.

Just last year in *United States v. Nixon*, 418 U.S. 683 (1974), this Court observed the interface between these three separate but related commands. In overriding the President's generalized claim of executive privilege and ordering disclosure *prior to trial*, this Court found that the tapes could be relevant at trial, *inter alia*, for the purpose of impeaching the credibility of "any other co-conspirator" who testified. *Id.* at 701. The tapes were ordered produced because:

> "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.
>
> * * *

"The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

* * *

"... [T[he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts...." *Id.* at 709, 711-12.

1. The Compulsory Process Clause Requires the Prosecution To Produce Possible Impeachment Materials Upon Timely Demand by a Defendant.

In 1969, this Court suggested that "in some situations denial of the production of a Jencks Act statement might be a denial of a Sixth Amendment right. There is, for example, the command of the Sixth Amendment that criminal defendants have compulsory process to obtain witnesses for their defense." *United States v. Augenblick*, 393 U.S. 348, 356 (1969).

Long-standing precedent for reliance on the compulsory process to compel production of impeaching materials for the defense can be found in Chief Justice Marshall's opinions sitting as a circuit court justice in

United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807).

> "The court's discretionary power to compel production of a document in the custody of a government agency must be exercised in the light of the requirement of the [compulsory process clause of the] Sixth Amendment.... This constitutional mandate extends to documentary as well as oral evidence. [Citations omitted]." *United States v. Schneiderman*, 106 F. Supp. 731, 735 (S.D. Cal. 1952); cited with approval in *Jencks v. United States*, 353 U.S. at 668 n.13 (1957).

Similarly, in *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974), the court stated that "[t]he prosecution's constitutional duty to disclose exculpatory material statements of witnesses on the defendant's request [citations omitted] is clearly within the sphere of influence of the Sixth Amendment's compulsory process guarantee."

Here petitioner sought the aid of the court through appropriate and timely motions during the course of the trial, but the trial court refused to order the notes produced for the court's inspection, let alone to take so much as a peek at the notes which petitioner sought to fully effectuate his rights of cross-examination of Newman.

> "In so far as the defendant seeks impeaching evidence by means other than examining prosecution witnesses, he seeks to produce evidence in his favor. Therefore, in so far as he wishes to impeach them by producing their prior statements or by subpoenaing independent witnesses, he must rely on compulsory process." Westen, *The Compulsory Process Clause*, 73 *Mich. L. Rev.* 71, 126 (1974) (footnotes omitted).

Petitioner's motions, made on three separate occasions, were appropriately limited and specifically designated the materials which petitioner sought to have produced. In each instance he sought to have the court at the very least examine the notes; each request for examination was rejected by the court, and petitioner was in fact denied the compulsory process guaranteed him by the Fifth Amendment. Petitioner made as strong a showing as he was able under the circumstances, *viz.*, that the notes were taken by the prosecutors during their various interviews with Newman; that occasionally the notes were read back to Newman; and that Newman corrected the notes which were read back to him. While petitioner recognizes that a trial court has a certain amount of discretion in ordering or not ordering the production of requested materials, the trial court is limited in the exercise of its discretion to order production only by the traditional doctrines of relevancy and materiality. *See Gordon v. United States*, 344 U.S. 414, 420 (1953). Relevancy and materiality for cross-examination purposes are established when "the reports are shown to relate to the testimony of the witness." *Jencks v. United States*, 353 U.S. at 669. Here the trial judge in failing even to make an inspection of the notes not only flatly refused to exercise his discretion, as was his duty, but also denied petitioner the right to make a complete record by ordering production of the notes so that they could at least become part of the record. Thus, petitioner suffered a total denial of his Sixth Amendment right to compulsory process, and his conviction must be reversed.

2. Effectuation of Petitioner's Right to Meaningful Confrontation of the Witness Newman Required Production of Possibly Impeaching Materials.

The primary object of the Sixth Amendment's confrontation clause is a personal cross-examination of the witness before the jury so that "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his . . . testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). This Court has consistently held the right of confrontation to be a fundamental right of a criminal defendant. *Kirby v. United States*, 174 U.S. 47, 55-56 (1899); *Alford v. United States*, 282 U.S. 687, 692 (1931); *In re Oliver*, 333 U.S. 257, 273 (1948); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); *Pointer v. Texas*, 380 U.S. 400, 405 (1965); *Smith v. Illinois*, 390 U.S. 129, 131-32 (1968); *Barber v. Page*, 390 U.S. 719, 725 (1968); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). These cases recognize that the witness's presence in court is only one side of the confrontation coin—the other is the right to *effective* cross-examination.

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.* . . . To say that prejudice can be established

> only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . ." *Alford v. United States*, 282 U.S. at 692-93 (emphasis added).

It has been recognized by some circuit court decisions that a failure to provide material to which a defendant is entitled under the Jencks Act may adversely affect a defendant's "ability to cross-examine Government witnesses and thereby infringe upon his constitutional right of confrontation." *Krilich v. United States*, 502 F.2d 680, 682 (7th Cir. 1974). *United States v. Cleveland* (II), 507 F.2d 731, 740-41 (7th Cir. 1974); *United States v. Aaron*, 457 F.2d 865, 869 (2d Cir. 1972); *United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969).

An important and recognized function of the cross-examination process guaranteed by the Sixth Amendment is the right to put to a witness questions "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. at 316.

In *Davis*, defendant was prohibited from asking the state's key witness, Richard Green, questions concerning Green's juvenile record. The state of Alaska, by statute and rule, prohibited disclosure of a juvenile record. Davis was not seeking introduction of the juvenile record as impeachment of Green's character as a truthful person, but rather to show that at the same time Green was assisting the police he was a probationer; and from there to argue that Green was

acting out of concern over loss of his probationary status and thus was vulnerable to "undue pressure from the police."

In reversing Davis' conviction, this Court stated:

> "On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which ' "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 . . .' *Smith v. Illinois*, 390 U.S. 129, 131 (1968)." *Id.* at 318.

This Court refused to indulge in the exercise of attempting to evaluate the effect of the denial of this Sixth Amendment right to Davis or on the probable outcome of his trial: "[w]e cannot speculate whether the jury as sole judge of the credibility of the witness would have accepted . . ." Davis' theory had it been presented. *Id.* at 317; *accord, Smith v. Illinois*, 390 U.S. at 131; *Alford v. United States*, 282 U.S. at 692. This Court's concern in *Davis*, as in *Smith* and *Alford*, was that the jury have the benefit of Davis' right to probe the influence of a possible bias in the testimony. "[Alaska's] policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320.

The witness Green in *Davis* was not unlike the witness Newman in the instant case. Green was the key witness for the state in *Davis*; Newman was the key

witness for the Government here. Both of them were vulnerable–Green as a probationer, Newman as someone who was committed to pleading to a felony while hoping for less and obviously seeking to curry the favor of the prosecution. In *Davis* there was a statute and court rule on which the state relied to foreclose this avenue of cross-examination. Here, the prosecutor asserted the claim of "work product" to withhold obviously relevant materials from petitioner's inspection. In *Davis,* defendant "was permitted to ask Green *whether* he was biased but counsel was unable to make a record from which to argue *why* Green might have been biased *or* otherwise lacked that degree of impartiality expected of a witness at trial." *Id.* at 318. Here, petitioner's efforts to get the impeaching materials were foreclosed when petitioner was refused access to them and could obviously ask no questions about them or their contents. Petitioner was in fact more grieved by the trial court's ruling than was Davis in that case. Davis' attack went to the witness' bias only. Here, to the extent materials contained contradictory matters to the witness' testimony on direct examination, they were classic impeachment. As stated C. in McCormick, *Evidence* §34, at 68 (1972):

> "The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises doubt as to the truthfulness of both statements."

Further, to the extent that they exposed the extent of Newman's assistance as so vividly portrayed by the Government in its brief to the Ninth Circuit at 64

(discussed *supra,* footnote 29), they demonstrate Newman's vulnerability to undue pressure from the Government.

The effect of the trial court's ruling in *Davis* and in petitioner's case was the same, *viz.*, the inability to put matters concerning the witness' credibility before the jury thus denying the petitioner in each case his vital Sixth Amendment right to confrontation.

CONCLUSION

The decision of the court below should be reversed and petitioner granted a new trial for the reasons set forth herein.

DATED: August 20, 1975

Respectfully submitted,

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APPENDIX

EXHIBIT 1

1. Ipsissimis verbis conversations with petitioner in testimony:

J131, J132, J133, J134, J137, J138, J139, J140, J150, J153, J154, J167, J168, J170, J176, J177, J191, J194, J204, J212, J213, J230, J232, J259, J260, J263, J264, J267, J268, J269, J270, J271, J272, J276, J277, J291, J292, J293, J294, J295, J296, J299, J302, J311, J317, J318, J335, J341, J348, J349, J354, J356, J361, J362, J365, J366, J368, J382, J383, J385, J397, J398, J399, J407, J408, J410, J430, J432, J433, J435, J436, J439, J440, K3, K4, K21, K24, K29, K37, K47, K50, K55, K58, K67, K68, K69, K82, K84, K100, K106, K111. (Total: 91 pages)

Ipsissimis verbis conversations with petitioner in pretrial statement:

22, 39, 51, 52, 67, 70, 71 and 75. (Total: 8 pages)

2. Transcript pages of exhibit discussion in testimony:

Page	*Exhibits Discussed*
J134-5	3N-4, 3N-5, 3M-6, 3M-7
J140-43	5-H
J143-44	3M-01
J144-46	3FF-26
J146-150	3M-03
J150-1	5A
J152-53	5B
J155-56	3FF
J156-60	3M-01
J160-61	3M-03
J163-64	5H
J165-67	3GG

J172-74	3GG-25
J182-86	3Q-16
J186-87	3Q-17, 3Q-18, 3Q-19, 3Q-20
J195-97	25A, 25B, 25C, 3EE
J197-206	25D
J206	25E
J208-10	25F
J213-15	3EE
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J226-30	3EE
J-236-42	32A
J244-45	1C
J261-62	4F
J273-74	10L
J282-84	10J
J285-89	3X-16
J297	3W
J305-06	10J
J306-09	3GG, 3H-32
J309-10	6L, 6M, 6N, 6O, 6P
J310-16	10M
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J359-60	10F-6, 3U-44, 10F
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J369-70	23D, 23E
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J371-72	14A, 23N, 23O
J372-74	3AA, 3GG, 3O-48, 3BB
J378-79	3I-56, 3GG-40
J379-80	10E-4
J380-81	10E-16
J381-82	10E-11, 10E-15
J383-84	10J
J391-93	3P-54
J393-94	3BB
J394-95	3P
J395-404	K15
J412-13	3GG
J413-17	3R-72, 3R-73
J417-18	3DD, 28B
J422-25	3AA
J425-27	23N, 23O
J427-31	13A
J431-32	26I
J436-37	3GG
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J438-40	3F-78
K6	10C
K6-7	34C
K21-26	6Y
K26-31	10D, 10F
K33	10F
K34-40	3I-56, 8A, 8B

K40-51	7B, 7C, 7F, 7G
K51-56	10A
K56-60	12K
K64-67	20B, 3Z-34
K67-69	12A
K69-71	20A
K73-74	20A
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K91-94	12N
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K96-102	27G
K102-108	12G
K108-13	3L-69
K114-17	32B

(Total pages of exhibit discussion in trial testimony: 273)

(Total number of exhibits mentioned or discussed: 73)

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28-31	25C
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36-39	11A
44-46	11J
46-48	12I
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(Total number of exhibits mentioned or discussed: 27)

3. Pages mentioning or discussing transactions with annuitants or lenders:

(1)	Royal Bank	-0-		(46)	J132-175, K7, K9
(2)	Brickey	-0-		(10)	J432-440, K2
(3)	Franklin/Williams Peters	-0-		(16)	J406-417, 429-432
(4)	Dixon	18-32	(15)	(41)	J190-230
	- Liberty Bank	25-27	(3)	(9)	J205-210, J213-215
(5)	Lambros	13-18	(6)	(23)	J175-187
(6)	Tucker	33-35	(3)	(38)	J256-262, J285-297, J321-338
(7)	Stacy	36-46	(11)	(27)	K95, K107-8, J324-338, K56-60, K88-91
	- Hylan	43-46	(4)	(3)	K89-91

(8)	Clark	49, 54, 58-73	(18)	(39)	K30-32, K42-43, K46-53, K66, K68-70, K73-75, J298-304, J306-312, J318, J356-57, J361-63
	- Mid-Continent	61-67	(7)	(12)	J338-346, K23-25
	- Kaw Investment	67-70	(4)	(8)	K47-52, K74-75
	- Sayles, Johnson County Bank	71-73	(3)	(8)	K65-66, K70-71, K73-78
(9)	Tager	-0-		(11)	J353-60, K33, K53, K75
	- Twin Cities State Bank	73-75	(3)	(1)	K27
(10)	Darden	-0-		(11)	J375-383, K53, K75
	- First National Bank	76-78	(3)	(5)	K36-40
(11)	Hoover	79-84	(6)	(25)	K79-82, J347-53, J364-75, J385, J428
	- Kenslow	82-89	(8)	(21)	J369-75, J384-87, J391-95, J424-28
	- Hunt	89	(1)		-0-
	- Friedman	-0-		(9)	K79-81, K83-88
	- Potter	-0-		(1)	K109

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			J381-85,
			J397-404,
			K2-7, K29,
			K42-45,
			K46-49,
			K52-56,
			K74-75

Supreme Court, U. S.
FILED
NOV 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-6293

In the Supreme Court of the United States

OCTOBER TERM, 1975

PHILIP J. GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 113–123) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1974. On February 5, 1975, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* (App. 124). By order of March 5, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 5, 1975. The petition was filed on April 3, 1975, and was granted on June 16, 1975 (App. 125). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner originally presented eight separate questions in his petition for a writ of certiorari. However, this Court granted the petition "limited to Question 8 presented by the petition" (App. 125), which reads as follows (*ibid.*):

> Whether 18 U.S.C. § 3500, the Jencks Act, contains an "attorney's work product exception"; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time, where the witness corrected same, which notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation" had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of *Brady* v. *Maryland*.

STATUTE INVOLVED

18 U.S.C. 3500, the Jencks Act, provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as

> hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably

required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT

After a seven-week jury trial in the United States District Court for the District of Arizona, petitioner was convicted on fourteen counts of mail fraud, in violation of 18 U.S.C. 1341. See App. 33–47. He was sentenced to concurrent terms of two years' imprisonment and fined $1,000 on each count (App. 111). The court of appeals reversed his conviction on one count and affirmed as to the remaining thirteen counts (App. 113–123).

A. THE EVIDENCE AT TRIAL

1. The evidence at trial showed that petitioner was the owner and president of Financial Security Life Insurance Company (FSL), an Arizona corporation. He devised a scheme to defraud banks and other lending institutions by inducing them to extend loans on the basis of collateral that was worthless but whose lack of value was deliberately concealed.

The scheme worked in the following way: The company would issue single premium annuity policies that purported to be fully prepaid and thus to have a cash surrender value equal to their face amounts. The policies actually had no cash surrender value because they were paid for by premium notes on which only the first year's interest had been prepaid; the policies themselves served as collateral for the notes (Tr. F–44).[1] Purchasers of the annuity policies would offer the policies to banks and other lending institutions as security for loans. The scheme was able to succeed because, in considering whether to grant the loans, the lending institutions would make inquiry of Financial Security Life regarding the validity and value of the annuity policies. In response, the FSL

[1] There are 15 volumes of transcript, consecutively lettered A through O. References will be to the volume letter and the page, except where the excerpt from the transcript has been included in the Appendix filed in this Court, in which case it shall be designated "App.".

would purposely conceal the fact that the policies had not been paid for in cash and would represent (either implicitly or explicitly) that the policies had cash surrender value and that the premiums were paid in full (Tr. F–74, E–395—E–398, K–37—K–40). On the basis of these representations, the lending institutions would authorize the loans. It was only later, if the lending institutions had occasion to foreclose on the loans and seek immediate payment on the policies, that they would discover that the policies had no value (Tr. E–14—E–15).[2]

Petitioner obtained a two-fold benefit from this scheme. First, Financial Security Life received yearly interest payments on the notes used to purchase the policies. More importantly, the "sale" of the annuity policies and the acceptance of the premium notes inflated the financial assets of the company on paper and thus presented a financial picture far more impressive than was the fact. Since petitioner's ultimate goal was to sell FSL and other companies he con-

[2] The evidence supporting Count 3 of the indictment is typical. Robert S. Clark, a co-defendant who pleaded guilty, obtained first an $80,000 loan and thereafter a $10,000 loan from the Mid-Continent National Bank of Kansas City, Missouri (Tr. D–261, D–419, D–422—D–423, D–442), offering as collateral five single-premium annuity policies, each having a face value of $20,000 (D–238). Before extending the loans, the bank mailed questionnaires regarding the policies to Financial Security Life; Clark personally returned the completed questionnaires to the bank (Tr. D–437). The completed questionnaires represented that the cash value of each policy was $20,000, that there were no existing assignments of record, and that the payment of premium and the option on premium default were "per annuity contract"; the bank president testified that he understood those answers to mean that the annuity contract—which contained no endorsements (Tr. 442)—was, as written, all-inclusive as to its terms (Tr. D–441). In fact, however, Clark had paid for the policies with a $100,000 premium note to Financial Security Life (Tr. D–237—D–238) and a $100,000 promissory note to Financial General Capital Corporation, another of petitioner's companies (Tr. D–245—D–246). He also executed a Reservation of Benefits and Proceeds rider which reduced the cash value of the policies by the amount of the unpaid balance of the premium note (Tr. D–240—D–243); the rider—which was not requested by Clark although stating on its face that it was (Tr. D–243—D–244)—was not attached to the policies or otherwise called to the bank's attention (Tr. D–442). When Clark defaulted on the loans, the bank retained counsel to attempt to collect on the policies. Counsel's inquiries to Financial Security Life were answered by a letter which for the first time revealed that the policies had been paid for by a premium note which had not been paid and that the cash surrender value of the policies was offset by the amount due on the note (Tr. E–14—E–15). The loans to Clark by the bank were never repaid (Tr. D–424) and were eventually charged off by the bank as uncollectable (Tr. D–425).

trolled to a publicly-held corporation in return for the controlling stock in that corporation, the stronger FSL's financial position appeared, the better opportunity petitioner would have to negotiate a favorable deal (Tr. F–17—F–20, F–25—F–29, J–268—J–269).

2. Edwin S. Newman, a lawyer who had been a close associate of petitioner and had been vice president of Financial Security Life Insurance Company and vice president of Financial General Capital Corporation, a related corporation also controlled by petitioner, was indicted along with petitioner and three others (App. 33–47). However, Newman's case was severed prior to trial, and he agreed to plead guilty to one count of the indictment, to furnish a complete

statement under oath concerning the events that were the subject of the indictment, and to testify as a government witness at petitioner's trial (App. 48–50).[3]

At trial, Newman was the last and primary witness for the government in its case-in-chief. Newman testified that he had either participated in or been present during all of the transactions that were the subjects of the indictment. He testified in detail concerning petitioner's operations at Financial Security Life and Financial General Capital and about the transactions involved in this case. He also corroborated the testimony of other government witnesses.

Specifically, Newman testified about the planning and execution of the scheme devised by petitioner. He described a meeting between himself, petitioner and William Skillman at which the annuity concept was developed, but he said he contributed nothing to the discussion at the meeting (Tr. K–305—K–306). Newman's function while he was employed by FSL was specifically to implement petitioner's instructions and decisions with whatever paperwork or detail work was required (Tr. J–234). He was therefore responsible for the paperwork necessary to issue the annuities and for the responses to lending institution inquiries (Tr. F–63, K–37, K–47, K–57, M–115—

[3] Petitioner makes much of the specific terms of Newman's plea bargain with the government (Br. 13–14, 54–57). However, since this Court did not grant the petition on the question argued by petitioner therein—whether he was denied due process by a failure of the government to reveal the full details of the plea arrangement—it is not open to petitioner to attempt to raise this question anew.

M–116). However, at no time during Newman's employment did he consider himself free to initiate independent courses of action on behalf of the company; his activities were always under the direct control of petitioner (Tr. J–235). Petitioner made very clear what he wanted done, and Newman was either to implement petitioner's ideas or leave the company (Tr. K–353).[4]

[4] The tone of the Goldberg-Newman relationship is reflected in a memorandum written by petitioner to Newman on December 7, 1966 (Gov't. Exhibit 32A). It read in pertinent part:

"Your original function was to implement *me*. This means that your work is done only in relationship to *me*.

"This does not eliminate your necessity for thinking and using your judgment, but it does strictly prohibit you from talking to anyone on my behalf without quoting the message, decision or judgment and mentioning that you are basing it on my precise thoughts to the individual. * * *

"Various people think that when you say something that this is coming from you and not from me and accordingly refuse to act on it. I want my opinion given and related as my opinion. You can give your own opinion 24 hours a day, but state that it is yours. It may be adamantly [*sic*] opposed to my opinion, but it can be given and should be given, but identified.

"All of the above applies to personal contacts, telephone and conferences."

* * * * *

"It is your responsibility, if you have an idea of how to handle a financial deal such as Marques (in FSL) for you to place a Memo to File with copies to the attorney handling FSL, copy to PJG [petitioner] marked Pending and Action, and any other appropriate person or file."

* * * * *

"Further, you will have a brief conference with me every morning on those items which you will work on that day, and only on completion and follow-up will you accept new areas.

"This in effect becomes a Procedural Manual for our relationship."

Thus, when petitioner was out of town he kept in daily telephone contact with Newman (Tr. K–268—K–269), and he required Newman to report back to him when Newman was away from the home office (Tr. J–191). Petitioner, unless out of town, personally opened all the incoming mail in the morning (Tr. K–243) and read all correspondence prepared by Newman and sent by or on behalf of his companies (Tr. N–327). For example, an answer to an inquiry from the First National Bank of Mason City, Iowa, was sent only after a note was directed to Newman saying that petitioner wanted to know how Newman intended to answer the inquiry, and after petitioner told Newman that he wanted the answer phrased in such a manner as to make it possible for money to be borrowed against the policies (Tr. K–36—K–37).[5]

Petitioner responded to Newman's resignation as a trustee of a trust fund for the benefit of petitioner's wife (see Tr. K–112—K–113) with a letter to Newman, dated May 25, 1969 (Gov't. Exhibit 32B), in which he said, *inter alia*:

> I am also very sorry about the newspaper publicity, particularly where FSL is involved and your name has been mentioned. I am totally responsible for everything that has happened in FSL and again, while I know that everything we did was legal, legitimate and in good faith, I

[5] At the time Newman wrote the letter, he knew that the policy had been paid for with the premium note, that the usual riders had been attached that rendered the policy in fact worthless as collateral, and that the policy was worth nothing in the hands of the bank (Tr. K–39—K–40). See also Tr. K–46—K–88.

> am deeply concerned that anything would wipe off on you.
>
> The entire annuity program was my concept, and you only did your job in implementing my decisions. If you feel that you want to take action in your own personal behalf to disassociate yourself from these matters, I will certainly understand.[6]

B. PETITIONER'S DEMAND FOR THE PROSECUTOR'S NOTES

1. During the government's case-in-chief, Newman testified for a week on direct and cross-examination. He was also the government's only rebuttal witness. Prior to trial, the government provided petitioner with copies of (1) an 89-page state-

[6] Petitioner's defense at trial was that he believed the annuity concept to be lawful and proper and that he relied upon his attorneys, including Edwin S. Newman, to insure the legitimacy of the program (see Br. 12). Newman, however, testified that he did not act as a lawyer for FSL or petitioner, that his legal abilities were rarely utilized by petitioner, and that he never had occasion to render legal advice on a continuing basis to either petitioner or the companies owned or controlled by the latter (Tr. J–231—J–234, K–153—K–154). Rather, as indicated, Newman's function was solely to implement petitioner's instructions (Tr. J–234, M–331—M–332). In this respect, he drafted position papers at petitioner's direction (Tr. K–211) and memoranda of meetings between petitioner and others (K–305); provided transportation on petitioner's behalf for other persons (Tr. D–230, F–13); wrote books, press releases and other such items for and in the name of petitioner (Tr. K–160, K–251—K–252); attended to and executed all necessary paperwork required to issue an insurance policy (Tr. F–63, J–178, M–115—M–116); communicated on petitioner's behalf with various attorneys (Tr. K–157, N–135—N–137); and initiated and answered correspondence relating to lender approval of loans collateralized by Financial Security Life annuity policies (Tr. K–37, K–47, K–67—K–69).

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ment that Newman had given to the prosecutors and a postal inspector, under oath before a court reporter, on May 11, 1973, eleven days before trial; (2) a 15-page memorandum of an interview of Newman by a postal inspector, three-and-one-half years prior to trial; and (3) a 54-page excerpt from the transcript of a grand jury proceeding in the Eastern District of Michigan, constituting all of Newman's testimony before the grand jury.

Petitioner's trial began on May 22, 1973, and concluded on July 14, 1973. On June 27, during cross-examination, Newman stated that, subsequent to giving his sworn statement on May 11, he had had a number of conferences with the prosecutors at which he went over the testimony that he would give at trial; he said the prosecutors had taken notes at these conferences (App. 90). The first such conference took place on May 13, nine days before trial (App. 91); subsequent to the commencement of trial, Newman had met with the prosecutors on June 9, 10, 16 and 17, and "portions of each day since" (App. 93). Newman was specifically asked about the duration of only the June 16 and June 17 conferences; he said that the first had lasted four to five hours and the second approximately six hours (*ibid.*).[7]

When asked if, during the May 13 conference, the prosecutors had "sometimes" questioned him about

[7] Later, during his appearance as a government rebuttal witness, Newman stated that he had spent an average of five hours each day at the prosecutors' office in the week since he had concluded his testimony during the government's case-in-chief (App. 110).

what he had just said to them to make sure that they had gotten it down correctly, Newman replied: "They may have. I don't really remember that that was part of the pattern" (App. 90–91). When subsequently asked if during the conferences on June 9 and 10 the notes were "occasionally read back" to him to see if the prosecutors correctly understood what he was saying, he replied "[p]robably from time to time" and acknowledged that it "would happen" that he would inform them whether their understanding of what he was saying was correct or incorrect (App. 92).

Petitioner's counsel thereupon moved for production of the notes under the Jencks Act, 18 U.S.C. 3500 (App. 93). The court responded: "Aren't these attorneys' work product, notes of interviews with witnesses, just like yours are?" (App. 94). The court denied petitioner's motion for production, without prejudice to reopening the matter if petitioner could provide "some authority for use of attorney's work product in interviewing a witness, with his impressions, plans, his strategy * * * when you have already got reduced to testimony a statement of the witness, that this attorney's notes in preparation for trial should be discoverable" (*ibid.*). Although petitioner subsequently renewed his motion in writing, he never provided the requested authority. See App. 97.

In the written renewal of his motion requesting production of the notes, petitioner relied upon both the Jencks Act and *Brady* v. *Maryland*, 373 U.S. 83 (App. 53–56). Alternatively, petitioner requested the court to order the notes produced for *in camera* inspection to

determine whether they were producible to the defense (App. 55). During oral argument on the motion, the court inquired: "These are notes made by a trial attorney in preparation for trial and interviewing a witness, aren't they? Is there any question about that?" Petitioner's counsel responded: "That is as I understand it" (App. 97). The prosecutor represented (App. 98):

> [T]hese were merely our notes which reflect substances of conversations, our impressions, certain entries that would be classified as trial strategy. They were not taken down verbatim. They were not shown to the people that we were interviewing. Nobody was asked to sign them in the form of a signed statement, and we feel that it is properly the work product of counsel and we would stand on that.

The court thereupon ruled that production of the notes was not required and denied the renewed motion (App. 99).

2. Denial of production of the notes was one of the issues raised by petitioner in the court of appeals. Although the notes had not been tendered to the district court and made part of the sealed record,[8] the notes were tendered to and accepted by the court of appeals for lodging. After examining the notes, the court of appeals found "no clear, prejudicial error" in the trial court's denial of petitioner's request for

[8] That procedure had been followed with respect to an unrelated set of notes for which a request for production was also denied (see Tr. I–287), and the prosecutor's initial recollection was that both sets of notes were handled in the same fashion.

production (App. 120). The court held that, "[a]part from the question whether such notes were exempt from the Jencks Act * * * as 'work product,' they were not statements of the defendant [*sic*, undoubtedly 'witness' was the word intended] within the meaning of § 3500(e)" (*ibid.*).

C. THE NATURE OF THE NOTES

The notes that were lodged with the court of appeals have been forwarded to this Court because their examination may aid a proper resolution of this case, as it did in the court below.[9] The lodging in the court of appeals consisted of a total of 237 pages

[9] The original and nine copies of the notes, which we have paginated for easier reference, have been sent to the Clerk of the Court; we also sent a paginated copy to petitioner prior to the filing of his brief. For comparison purposes, we are also lodging one copy each of Newman's 89-page sworn statement, the 15-page memorandum of the interview of Newman by a postal inspector, and the transcript of Newman's testimony before the grand jury in the Eastern District of Michigan, all of which were produced to petitioner prior to trial.

We are not, as petitioner suggests (Br. 25), simply lodging the notes with this Court. In our view, they became part of the record when they were lodged with the court of appeals. We merely arranged for the clerk of the court of appeals to forward the notes to this Court. Moreover, there is no basis in the record for any suggestion that the notes lodged with the court of appeals and forwarded to this Court are not all of the notes taken by the prosecutors at the conferences with Newman. Contrary to petitioner's assertion (Br. 3, 25, 29, 45), the prosecutor did not describe what he was lodging with the court of appeals as "all the notes he could then find;" rather he stated that he was lodging "all of the notes." The prosecutor has executed a sworn affidavit, which we are filing with this brief, that the complete notes were lodged and that he so advised the court of appeals.

of notes;[10] these included not only the notes in the handwriting of the prosecutors, which were the subject of petitioner's production request at trial, but also certain notes in the handwriting of Newman himself.[11]

The notes of the prosecutors, most of which were made on white or yellow lined legal-size paper, are of three general types:

1. 135 pages of the notes (pages 2–17, 20–63, 148–207, 209–223) consist of notations, often in outline form, which mix together factual material, questions, and ideas for trial strategy. These pages contain cryptic jottings, underlinings, interlineations, cross-references, arrows, doodles and marginal notations.

2. 58 pages of the notes (pages 64–97, 102–125) consist of questions prepared by the prosecutors to use in cross-examination of petitioner.

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[10] We have numbered the pages 1 through 238 and refer to the pages by number throughout this brief. The first page is a cover page containing the case name and number and the date on which the document was lodged with the court of appeals.

[11] We advised counsel for petitioner prior to the time he filed his brief in this Court that we had discovered that some of the notes were in fact written by Newman rather than by the prosecutors. We have been informed that pages 2–17, 20–40, 43–97, 102–125, 148–186, 192–193, 196–198, 207, 209–210, 213–215, and 217–223 were written by then Assistant United States Attorney Ronald A. Lebowitz; pages 41–42, 187–190, 199–206, 211–212 and 216 were written by Assistant United States Attorney Joseph Raymond Keilp; and pages 18–19, 126–147, 208 and 224–238 were written by Newman himself. Pages 191 and 194–195 were typewritten by prosecutor Lebowitz, and pages 98–101 are photocopies of pages from the trial transcript.

3. Four pages (pages 98–101) are photocopies of pages from the trial transcript.[12]

An examination of the prosecutors' notes fully supports the characterization made by the government in the court of appeals concerning the prosecutors' conferences with Newman and the nature of the notes resulting therefrom (Gov't. Ct. App. Br. 63–64):

> * * * Edwin Newman met and conferred with government attorneys on numerous oc-

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[12] The notes written by Newman himself present issues not directly encompassed within the Court's certiorari grant. These issues are discussed in Part II of our argument, *infra*, pp. ~~64–71.~~ 65-72

The notes in Newman's handwriting are of five general types:

1. 22 pages consist of essentially legal advice given by Newman, a lawyer, to the prosecutors. Two pages (pages 18–19), contain an outline suggesting to the prosecutors how they should present their case to the jury. 20 pages (pages 126–129, 131–146) are questions suggested by Newman for the prosecutors' use in cross-examining petitioner.

2. Three pages (pages 130, 229–230) are accounting analyses.

3. Three pages contain factual information relating to petitioner. Page 147 is a dated chronology of events in outline form, some entries being no more than a word or two or an abbreviation; and pages 228 and 231 are cryptic notes.

4. Five pages contain material relating solely and specifically to witness Paradine, who testified for both the government and petitioner. Paradine was a former state insurance investigator (and subsequently an employee of petitioner) who had reviewed the assets of Financial Security Life Insurance Company and prepared a report thereon. One page (page 208) is an analysis of information that could be developed on cross-examination of Paradine, and four pages (pages 224–227) contain an analysis, with page references, of the official report prepared by Paradine.

5. Seven pages (pages 232–238) are a narrative statement relating to the activities of Paradine and his contacts with both Newman and petitioner.

casions. Each of these conferences consumed several hours of conversation and in excess of 40 total hours were spent. * * *

* * * * *

Newman, in fact, did far more than answer questions. He helped the government attorneys in drafting questions to be asked of him and of other witnesses. He helped suggest certain areas of cross-examination to be covered in the event that Goldberg ultimately testified. He explained or made sense out of an almost endless number of letters, documents and other pieces of physical evidence. In many respects, Newman effectively educated the prosecution in the short time available as to the significance of the every day operations of FSL, as well as providing invaluable insight into the personality and past history of Philip Goldberg.

* * * These entries were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situations had been reached. They were not written to preserve testimony, nor do they ever reflect the complex degree of conversation which preceeded their recordation. Rather, they were prepared to aid the examining attorney in formulating his questions during the trial itself.

Furthermore, an in-camera inspection of the notes will reveal that the entries appearing thereon are not sufficiently comprehensible to be used for impeachment purposes. The entries lack sufficient specificity as to time, place and parties to confront a witness with the appropriate subject matter required for a foundation to use prior inconsistent statements, if any.

SUMMARY OF ARGUMENT

1. The primary issue in this case is whether the government trial attorneys' notes of conversations with a government witness, prepared by the prosecutors to enable them adequately to present the government's case before the jury, are the kind of witness "statements" contemplated by the Jencks Act.

It is our position that there is no broad or absolute "attorney's work product exception" to the Jencks Act as such, but that the Act's narrow definition of the term "statement" reflects a congressional recognition of principles underlying the work product doctrine. For example, the 89-page narrative statement given by Newman on May 11 (see p. 11, *supra*)—while generated by the prosecutors in connection with their trial preparation and thus arguably their "work product"—was, in our view, producible under the Act. Material of this type may be viewed as truly a statement *of the witness,* which, almost inevitably, does not contain the mental impressions, ideas for trial strategy or personal beliefs of the attorney. In general, however, an attorney's notes of witness interviews will not be "statements" within the meaning of the Jencks Act.

In enacting the Jencks Act, Congress defined the term "statement" narrowly and limited production to two types of statements: "a written statement made by said witness and signed or otherwise adopted or approved by him" (18 U.S.C. 3500(e)(1)), and "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially

verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement" (18 U.S.C. (1964 ed.) 3500(e)(2)).[13] As this Court has recognized, such limited definitions were adopted because it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." *Palermo* v. *United States,* 360 U.S. 343, 350. In light of the congressional intent, it would be incongruous if prosecutors' interview notes generally, as exemplified by those in the record in this case, were considered "statements" within the meaning of the Jencks Act.

When witness statements are taken by an attorney in preparation for trial, principles underlying the work product doctrine support the congressional judgment to define "statement" narrowly. Unlike the investigative agent who interviews a witness during an investigation, the attorney is not seeking all the facts relating to the events in question; he has no need to take down the witness's statement in a cohesive, chronological fashion for eventual use by others. The information the lawyer seeks is for his own immediate use at trial, and his recordation of information therefore reflects his strategy as to how best to present his evidence, how the potential testimony of the witness he

[13] The language "to an agent of the government" was deleted when the Jencks Act was amended in 1970. See p. 51, n. 32, *infra.*

is interviewing correlates with other evidence, and how the testimony of the witness fits into the lawyer's theory of the case and understanding of the governing law. He does not verify with the witness the language he has in his notes. Thus, the notes taken by the lawyer are by their nature not the witness's own words taken down in a context that is reliable for use in cross-examination for impeachment.

While an investigator's report is normally a typed document in narrative form, a lawyer's notes are almost always handwritten, often abbreviated and perhaps illegible; if their production is compelled, the lawyer will be hard put to avoid testifying as to their meaning. Moreover, since the attorney's notes will often be in his own cryptic language, there are bound to be verbal inconsistencies between them and the witness's testimony. If the witness denies having made the statement contained in the notes, opposing counsel may call the note-taker to the stand; or the attorney himself may feel the need to testify to explain to the jury the meaning of the notes or, if his own credibility is called into question, to contradict his own witness.

We suggest that these problems can be avoided by defining the term "statement" strictly where lawyers' notes are involved, as Congress intended. Indeed, a review of the legislative history of the Jencks Act itself supports the view that Congress intended to shield prosecutors' trial preparation notes from production.

Petitioner urges a far broader definition of producible statements under the Jencks Act, under which virtually any writing whose contents (or a portion of whose contents) have been disclosed to the witness and the general correctness of which the witness has verified would be deemed a prior written statement of the witness under 18 U.S.C. 3500(e)(1) as "otherwise adopted or approved." We submit that, if the Court feels unable to reject petitioner's definition of "statement" on this record, sound decision-making requires a remand to the district court to obtain answers to a significant number of unanswered factual questions that must serve as the predicate for any promulgation of standards regarding the meaning of "adopted or approved." (If, on the other hand, the Court adopts our position, no such remand would be required, since it is already clear from the record that the prosecutors' notes do not constitute producible statements under the standards we propose.)

Finally, petitioner's reliance on *Campbell* v. *United States,* 373 U.S. 487 (*"Campbell II"*), is misplaced. Not only are there significant distinctions between the facts of this case and the facts that were before the Court in *Campbell II,* but the extension of that case that petitioner urges would be a sharp departure from the congressional intention strictly to limit the kind of statements producible under the Jencks Act. Moreover, because of the differences in purpose between the note-taking of a lawyer and the note-taking of an investigator, we seriously question whether *Campbell II* ought ever to be applied to an attorney's notes as opposed to an investigator's report, which is what was involved in *Campbell.*

2. The petition for a writ of certiorari was granted to consider whether the Jencks Act contains an "attorney's work product exception" that makes non-producible an attorney's notes of conversations with a witness. However, included among the notes in the prosecutors' files in this case were 40 pages of material written by the witness Newman himself. It appears that the question of the producibility of those notes is beyond the scope of the grant and turns upon different considerations.

However, while we recognize that petitioner may have been unaware of the Newman notes at the time he filed the petition, it seems clear from simple inspection of the notes and review of the course of events at trial that there is little in them that was even arguably producible. Accordingly, this Court, if it reaches the question, may affirm the judgment of the court of appeals as to these notes. On the other hand, since it is not clear that the court of appeals was aware that some of the notes lodged with it were written by Newman, this Court may wish to remand for further consideration of this issue.

3. The notes of the government trial attorneys and of the government witness were not producible under either the Fifth or the Sixth Amendment to the Constitution.

Brady v. *Maryland,* 373 U.S. 83, and *Moore* v. *Illinois,* 408 U.S. 786, do not require, as petitioner argues, the production of any materials that are not tech-

nically Jencks Act statements but that nevertheless might be helpful for impeachment purposes. Were *Brady* so read, there would be nothing left of the carefully constructed Jencks Act, with its limited definition of "statement," for all materials, whether or not statements under the Jencks Act, would become producible under *Brady* because possibly helpful in attacking a witness's credibility.

Nor has petitioner demonstrated a violation of the Sixth Amendment's Confrontation or Compulsory Process Clauses. Neither the unrestricted right of cross-examination, to which he refers, nor the right to subpoena witnesses and documents carries with it a right to obtain material from government files not otherwise producible either under the Jencks Act or by virtue of the due process considerations recognized by *Brady*.

ARGUMENT

I. THE JENCKS ACT DOES NOT CONTAIN A BROAD "ATTORNEY'S WORK PRODUCT EXCEPTION" AS SUCH, BUT THE ACT'S NARROW DEFINITION OF "STATEMENT" REFLECTS PRINCIPLES UNDERLYING THE WORK PRODUCT DOCTRINE AND, WITH RARE EXCEPTIONS, PROTECTS ATTORNEYS' NOTES FROM PRODUCTION

In *Jencks* v. *United States*, 353 U.S. 657, this Court recognized the discretion of trial courts to order the prosecution to disclose to the defense statements made by government witnesses, and recorded by investigative agents of the government, touching upon the events and activities as to which the witnesses testified at trial; it said that the defense is entitled to inspect

such statements to determine whether they would be helpful in cross-examination to impeach the testimony of the government witnesses (353 U.S. at 668–669).[14] However, the discretion recognized by the Court in *Jencks* was subsequently limited by Congress in the so-called Jencks Act, 18 U.S.C. 3500. See S. Rep. No. 981, 85th Cong., 1st Sess. 2–4 (1957). The Act provides that after a government witness has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)).

The Act defines the term "statement" narrowly and provides for production to the defense of only those statements specified therein. *Palermo* v. *United States*, 360 U.S. 343, 349–351.[15] To be producible under the Act, a statement must either be "a written statement made by said witness and signed or otherwise adopted or approved by him" (18 U.S.C. 3500 (e)(1)) or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral state-

[14] The Court has recently recognized the same inherent power in the trial courts to order the defense to produce witness statements to the prosecution, in order to facilitate full disclosure of all relevant facts. *United States* v. *Nobles*, No. 74–634, decided June 23, 1975.

[15] Absent constitutional requirements, the Jencks Act is the exclusive mechanism for the production of statements by the prosecution to the defense. *Palermo* v. *United States*, *supra*, 360 U.S. at 351.

ment made by said witness and recorded contemporaneously with the making of such oral statement" (18 U.S.C. 3500(e)(2)).[16] By so restricting the definition of the type of statement to be produced, Congress expressed its intent that "only those statements which could properly be considered the witness' own words should be made available to the defense for purposes of impeachment." *Palermo* v. *United States, supra,* 360 U.S. at 352.

The primary issue in this case is whether the government trial attorneys' notes of conversations with a government witness, prepared by the prosecutors to enable them adequately to present the government's case before the jury, are the kind of witness "statement" contemplated by the Jencks Act. In a sense, however, the foregoing is an unduly narrow delineation of the issue before the Court. While this case happens to involve notes taken by a prosecutor, the considerations guiding its decision would bear with equal weight upon the question of the power of the trial court to order production of a defense attorney's notes. This is so because any claim that an attorney's notes are producible is necessarily rooted in the notion that the producible portions are in reality the *witness's* statement, without significant admixture of the attorney's personal and professional input. If such

[16] A third type of statement, not relevant here, was added to the Jencks Act definition of "statement" by a 1970 amendment to the Act. Now included within the definition is "a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury" (18 U.S.C. 3500(e)(3)). See Pub. L. 91–452, Title I, Section 102, 84 Stat. 926.

material is not sheltered by policies, relating to the right of a party to the unfettered aid of counsel, that apply equally whether the party be defendant or government, then it is hard to discern a basis for disparate treatment when it is the defense attorney's notes rather than those of the prosecutor that contain the prior statement of the witness. Cf. *United States* v. *Nobles,* No. 74–634, decided June 23, 1975, slip op., pp. 5–7.[17]

A. THERE IS NO BROAD OR ABSOLUTE "WORK PRODUCT" EXCEPTION BARRING DISCLOSURE OF WITNESS STATEMENTS SIMPLY BECAUSE THEY HAVE BEEN GENERATED BY AN ATTORNEY IN THE COURSE OF TRIAL PREPARATION

We believe that there is no broad attorney's work-product exception to the Jencks Act that shelters statements relating to the subject matter of the testimony of a witness merely because the statements were obtained by a government attorney rather than a government investigator. For if what is involved is truly the statement of the *witness*—that is, a statement written and signed or otherwise formally adopted or approved by him or a substantially verbatim recording of an oral statement—by definition

[17] This is not to say, of course, that the rights and duties of prosecutor and defense counsel are identical in a criminal case. Thus, the prosecutor is under an affirmative duty to disclose exculpatory evidence to the defense, while defense counsel has no analogous obligation with respect to inculpatory information. Moreover, defense counsel may have broader leeway to utilize testimony of doubted veracity than the prosecution has. But these areas of legitimate distinction implicate wholly different policies from the question of the producibility of prior witness statements, and we submit that principles of reciprocity would properly control the latter.

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it does not contain the mental impressions, trial strategy or personal beliefs of an attorney. Such material thus implicates only tangentially, if at all, the policies underpinning the work product doctrine.

Thus, in the event that a government trial attorney, during the course of a witness conference in preparation for trial, tape records or stenographically transcribes the witness's narrative account of certain events, the tape recording, "or a transcription thereof," would constitute "a substantially verbatim recital of an oral statement made by [the] witness **and recorded contemporaneously with the making of** such oral statement" within the meaning of 18 U.S.C. 3500(e)(2). It would therefore be producible under the Jencks Act, and we do not urge upon the Court a contrary view in the case where the statement is obtained by a government trial attorney in preparation for trial rather than by an F.B.I. agent or other law enforcement officer during an investigation.

Similarly, if the witness writes out a narrative statement of certain events in his own handwriting, such a statement would constitute "a written statement made by said witness and signed or otherwise adopted or approved by him" within the meaning of 18 U.S.C. 3500(e)(1). As we discuss in Part II, pp. 66–67, *infra,* seven pages of the notes handwritten by Newman in this case appear to be precisely that kind of statement. Upon proper demand and if it related to the witness's testimony on direct examination, such a statement would be producible under the Jencks Act. Finally, if, during a witness

conference in preparation for trial, the witness dictates a narrative statement to the government trial attorney, the attorney takes down the statement of the witness word-for-word and then either reads the statement back to him word-for-word or allows the witness to read the statement, and the witness signs the statement, initials it, or otherwise formally adopts it as his own or approves the language as correct, the statement would constitute a producible written statement within the meaning of 18 U.S.C. 3500(e)(1).

A true witness statement of the foregoing sort is unlikely to be generated by an attorney interviewing a witness in preparation for trial, because his purpose in taking notes is not to record the witness's narrative account of the facts but to further his own understanding of the case and to provide himself with written aids for use at trial. Moreover, because of this purpose, the attorney's notes will almost always contain his mental impressions, ideas for trial strategy and the like, and they are generally not shown to the witness and adopted or approved by him in any formal way. Thus, the examples we give set the outer limits of the kind of material in prosecutors' files that we believe Congress intended to include within its narrow definition of the term "statement."

Because Congress was concerned that government trial attorney's notes not be subject to routine inspection, we submit that any notes of the trial attorney other than those illustrated by the foregoing examples simply are not "statements" within the meaning of the

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Jencks Act. They are therefore not producible under the Act, and, in our view, there is no need for either an evidentiary hearing on the nature of the notes or an *in camera* inspection by the trial judge to determine whether they are statements within the meaning of the statute. The attorney's representation in open court that the notes were neither substantially verbatim, written by the witness in his own hand or dictated by the witness and then signed, initialed or adopted or approved by the witness in some formal way, is sufficient to bar production.

B. BY DEFINING THE TERM "STATEMENT" NARROWLY, CONGRESS INTENDED THAT ONLY THE WITNESS'S OWN WORDS BE PRODUCED FOR PURPOSES OF IMPEACHMENT

1. The *Jencks* decision secured to defendants the right to receive witness statements if they might possibly be useful on cross-examination to discredit a witness's testimony. The Court in *Jencks* rejected the requirement of a showing that a particular statement is inconsistent with the witness's trial testimony as a precondition to its production (353 U.S. at 668–669) and concluded that "[r]elevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness" (*id.* at 669). The Court stated (*id.* at 667):

> Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency.

> The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

In short, *Jencks* held that a defendant is entitled to the production of statements, if they exist and are in the possession of the government, that will enable him to test the precise language of the witness's trial testimony against whatever the witness has previously said on the same subject.

But to the extent that a witness's language on the witness stand is to be compared with his prior language on the same subject for "omission[s]", "contrast[s] in emphasis" or even "a different order of treatment"—if impeachment is to be attempted by showing subtle differences in language or barely perceptible shadings in approach—it should be the witness's own prior language to which the comparison is made. The veracity of a witness's testimony could not be properly questioned on the basis of subtle differences or barely perceptible shadings whose source was someone other than himself. The theory of the *Jencks* case therefore requires limiting production to materials that in fact reflect what the witness actually said, as opposed to materials that merely reflect second party accounts that summarize, interpret, or otherwise alter the witness's actual words.

Congress accepted this underlying premise of the *Jencks* case when it enacted the Jencks Act. It in-

tended by the legislation to require disclosure only of "an authenticated statement or report by the witness having to do with the activities of the defendant" (S. Rep. No. 981, 85th Cong., 1st Sess. 5 (1957)); and it was specifically concerned that "summaries of oral statements made by [a witness] * * * which the witness had never seen or in any way approved" not be disclosed (H.R. Rep. No. 700, 85th Cong., 1st Sess. 5–6 (1957)). For Congress believed that "the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else" (*id.* at 6).[18]

Thus, Congress limited producible "statements" under the Jencks Act to those that meet either of two definitions. The first statutory definition is "a written statement made by said witness and signed or otherwise adopted or approved by him" (18 U.S.C. 3500(e)(1)). As an alternative, which "widens the definition of 'statement'" (*Palermo* v. *United States, supra,* 360 U.S. at 351), Congress provided for the production of "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement" (18 U.S.C. (1964 ed.) 3500(e)(2)). As

[18] Senator Kuchel's remarks during the Senate debate are typical of the concern expressed: "* * * I think the ends of justice require the Congress, in determining the procedures in such a case, to clothe the witness, as against the defendant, with some protection, so that the witness will not have thrown at him records which are not agreed to be the witness' statements." 103 Cong. Rec. 15932 (1957).

this Court discerned the congressional meaning, such a limited definition of "statement" was adopted because it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selection, interpretations and interpolations." *Palermo* v. *United States, supra,* 360 U.S. at 350. "It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." *Id.* at 352.

2. As to written statements, Congress required the production of "a written statement made by said witness and signed or otherwise adopted or approved by him" (18 U.S.C. 3500(e)(1)). As this Court has said about that subsection, "[a]lthough some situations may arise creating peripheral problems of construction, its import is clear." *Palermo* v. *United States, supra,* 360 U.S. at 351.

On the floor of the House, Congressman Yates asked if the House version would permit examination of only a written report.[19] Congressman Keating,

[19] The House version of the bill defined statement as such "reports or statements of the witness in the possession of the United States as are signed by the witness, or otherwise adopted or approved by him as correct, relating to the subject matter as to which he has testified." See H.R. 7915, Section 3500(b), 85th Cong., 1st Sess. (1957), quoted in H.R. Rep. No. 700, *supra,* at 1. It is to this form of "statement" that this legislative history refers. Substantially verbatim oral statements were added to the definition of "statement" in conference.

one of the managers of the bill on the part of the House and a member of the Senate-House Conference Committee, replied that, in his opinion and in the opinion of the Attorney General, the *Jencks* case held only that the Government would have to produce statements which had been "identified and approved in some formal way" by the witness, "either signed by him, initialed by him, or taken down in a question-and-answer form and then approved by him." 103 Cong. Rec. 16119 (1957). See also S. Rep. No. 981, *supra,* at 5 (the term "statement" means "an authenticated statement or report by the witness"); 103 Cong. Rec. 16739 (1957) ("only statements * * * actually signed or formally approved by the witness") (remarks of Representative Keating).

Thus, the definition of "statement" found in 18 U.S.C. 3500(e)(1) means a statement actually written by the witness or a statement dictated by the witness and written by another or taken down by another in a question-and-answer form.[20] Unless actually written by the witness, the statement, to be within subsection (e)(1), must have been read by the witness and signed, or at least initialed or in some other formal way adopted or approved by him as correct. Where the statute says "signed, or otherwise adopted or approved," the legislative history indicates it means an approval or adoption comparable to a signature, and it refers to adoption or approval of the written statement itself,

[20] The 89-page statement that Newman gave to the prosecutors under oath before a court reporter, on May 11, 1973, is an example of this last type of written statement.

not merely the approval of a general account of which the writing may be representative. Where there is no formal verification from the witness that the statement is correct, such an unverified and unauthenticated writing is not a written statement within the meaning of 18 U.S.C. 3500(e)(1). See H.R. Rep. No. 700, *supra*, at 5.[21]

As to oral statements, Congress was unmistakably of the view that nonverbatim summaries are not to be treated as the statements of the witness, and that a witness should not be impeached by a statement that is not his own. The only products of oral interviews that Congress was willing to accept were those that could be equated to an electrical transcription, being both "substantially verbatim" and "recorded contemporaneously." In agreeing upon the definition for "oral statements" in 18 U.S.C. 3500(e)(2), the House-Senate conferees believed that their definition was

[21] There is some indication in the legislative history that a summary of an interview also may become a "written statement" of the witness, but only if the summary is adopted and approved by the witness as correct and made a matter of record. See H.R. Rep. No. 700, *supra*, at 6. However, the House made reference to such summaries before the Conference added a provision for production of oral statements, but only those that are substantially verbatim. It is therefore unlikely that summaries of oral statements, even if formally adopted or approved, are producible under the Act. In any event, the considerations that may have led the House to suggest production of summaries of interviews conducted by F.B.I. and other law enforcement agents, if adopted or approved, are not relevant to notes taken by government trial attorneys. For, as we show below, the government trial attorney has very different purposes in mind, and the results of his interview are very different kinds of notes.

"in line with the standard enunciated by Judge George H. Moore of the [E]astern [D]istrict of Missouri * * * in *U.S.* v. *Anderson, et al.*" H.R. Conf. Rep. No. 1271, 85th Cong., 1st Sess. 3 (1957). In *Anderson,* Judge Moore had indicated that a statement of a witness under the *Jencks* decision, if not actually written by the witness himself, includes "only continuous, narrative statements made by the witness recorded verbatim, or nearly so," and does not include notes made during an interview "which contain the subjective impressions, opinions or conclusions" of the person making the notes. *United States* v. *Anderson,* 154 F. Supp. 374, 375 (E.D. Mo.); see also 103 Cong. Rec. 15940 (1957). Thus, for an oral statement to be producible under the Jencks Act, there must be no question that it contains the words of the witness himself in narrative form, recorded substantially verbatim contemporaneously with the making of the statement.

3. In light of the foregoing, it would be incongruous indeed if prosecutors' notes were considered either "written statements" or "oral statements" of the witness within the meaning of the Jencks Act, except where—as in the three examples we cited at the outset—they are clearly the witness's own words. An examination of the notes written by the prosecutors in this case fully supports this view.[22]

Four pages of material contained in the notes lodged with the Clerk (pages 98–101) are photocopies of pages from the trial transcript. These are not

[22] We deal separately with the notes handwritten by Newman himself. See Part II, pp. 6[illegible]-72 *infra.*

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Newman's statements at all but are part of the examination at trial of the witness Paradine by prosecutor Keilp. In any event, the transcript pages were equally as available to petitioner as to the goverment. Nor are the 58 pages of questions, written by the prosecutors for use in cross-examining petitioner (pages 64–97, 102–125) "statements" of Newman within the meaning of the Jencks Act. An examination of these pages demonstrates that they are not factual statements in Newman's words, but questions fashioned by the prosecutors after talking to Newman that could be used to cross-examine petitioner. It would obviously be unfair to use such questions to impeach Newman's testimony.

As for the remaining 135 pages of notes written by the prosecutors during conferences with Newman (pages 2–17, 20–63, 148–207, 209–223), it is apparent on their face that they are not coherent narrative statements dictated by Newman or taken down by the prosecutors in a question-and-answer form, and then signed, initialed or in any formal way adopted as Newman's own or approved by him as correct. These pages contain the prosecutors' cryptic jottings, interlineations, cross-references, arrows, doodles and marginal notations, and were obviously designed only to aid the prosecutors' memory in preparing for trial and in formulating questions at trial. An examination of the notes shows that they do not reflect fully and without distortion what Newman said to the prosecutors. Rather, they mix together factual material, questions and ideas for trial strategy, and are therefore just the kind of non-verbatim summaries of

oral statements intended by Congress to be excluded from production under the Jencks Act. See *Palermo* v. *United States, supra,* 360 U.S. at 350, 352–353.[23] Thus, the notes are not Newman's "written statements" under 18 U.S.C. 3500(e)(1),[24] and were therefore not producible under the Jencks Act.[25]

[23] The fact that at least 40 hours of conferences yielded so few pages of notes is itself an indication that the notes are merely summaries "which evidence substantial selection of material" by the prosecutors. *Palermo* v. *United States, supra,* 360 U.S. at 352–353.

[24] Petitioner and *amici* do not claim that the prosecutors' notes constitute a substantially verbatim recital of what Newman said during the trial preparation conferences, within the meaning of 18 U.S.C. 3500(e)(2), but rather that the notes were written statements "adopted or approved" by Newman, within the meaning of 18 U.S.C. 3500(e)(1). See Pet. Br. 30, 41–42; Am. Br. 3, 5–12.

[25] Beyond the question whether the notes constitute Newman's "statements," rather than statements of the prosecutors, it seems that the present record does not support petitioner's assertion that they were "adopted or approved" within the meaning of Section 3500(e)(1). While petitioner now claims that the notes were read back to Newman "periodically" (Br. 28, 41)—thereby conveying the impression that all of the notes were systematically read to and approved by the witness—petitioner asked Newman during trial only if the notes were read back "sometimes" (App. 90) and "occasionally" (App. 92); Newman responded, and petitioner accepted the answer, "[p]robably from time to time" (*ibid.*). Moreover, his response referred only to the notes taken on June 9 and 10, 1973, not those taken on the many other days he met with the prosecutors. It is doubtful whether the facts concerning adoption or approval would change at a remand hearing. Indeed, it may be significant that petitioner—although not prevented by the district court from doing so—did not lay a firmer foundation for his contention that Newman "adopted or approved" the prosecutors' notes. See App. 90–93. The inadequacy of the present record to establish adoption by the witness is further discussed at pp. 54–58, *infra.*

C. WHEN WITNESS STATEMENTS ARE TAKEN BY AN ATTORNEY IN PREPARATION FOR TRIAL, PRINCIPLES UNDERLYING THE WORK PRODUCT DOCTRINE SUPPORT THE CONGRESSIONAL JUDGMENT TO DEFINE "STATEMENT" NARROWLY

1. Work Product Principles Are Implicated Because of the Nature of an Attorney's Trial Preparation Notes and the Purpose for Which They Are Prepared

The work product doctrine was recognized by this Court in the landmark case of *Hickman* v. *Taylor,* 329 U.S. 495, and it is now codified for civil cases in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[26] It was determined in *United States* v. *Nobles,* No. 74–634, decided June 23, 1975, slip op., p. 11, that the "doctrine applies to criminal litigation as well as civil * * *."

The work product doctrine affords a qualified and limited protection for trial preparation materials in the attorney's file that reflect his mental impressions, personal beliefs, trial strategy, legal opinions and conclusions, and the like.[27] The doctrine recognizes that "it is essential that a lawyer work with a certain

[26] Rule 26(b)(3) states that in ordering discovery of trial preparation materials, the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Rule 16 (b) and (c), Fed. R. Crim. P., and Rule 16 (a)(2) and (b)(2), Fed. R. Crim. P. (as amended, effective December 1, 1975), state only that the rule does not authorize the pre-trial discovery of "reports, memoranda, or other internal * * * documents" by either the government or the defense. See H.R. Conf. Rep. No. 94–414, 94th Cong., 1st Sess., 12 (1975).

[27] See generally *United States* v. *Nobles, supra,* slip op., pp. 11–14; *Hickman* v. *Taylor, supra,* 329 U.S. at 508–514, 514–519 (Jackson, J., concurring); McCormick, *Evidence* § 96, pp. 204–209 (2d ed. 1972); 8 Wright and Miller, *Federal Practice and Procedure* § 2025 (1970).

degree of privacy" while acting for his client in anticipation of litigation and that the "[p]roper preparation of a client's case demands that [the trial attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman* v. *Taylor, supra,* 329 U.S. at 510–511. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States* v. *Nobles, supra,* slip op., p. 13. "Moreover, the concerns reflected in the work product doctrine do not disappear once trial has begun." *Ibid.*

The considerations underlying the work product doctrine are particularly pertinent in the case of witness interview notes taken by a lawyer in preparation for trial. Unlike the F.B.I. agent or defense investigator who interviews a witness during an investigation, the attorney in conferring with the witness in preparation for trial is not seeking the broad outlines of what happened; he normally has that information in the agent's reports. He is not concerned, as is the agent, with taking down a witness's statement in a cohesive, chronological fashion for eventual use by others. Nor is he concerned with recording the witness's recollections some considerable period in advance of a trial. The information the lawyer seeks is for his own immediate use at trial, and the order in which he records the facts and events discussed necessarily reflects his strategy as to how best to present his evidence at trial. Cf. *United States* v. *Aviles,* 337

F. 2d 552, 559 (C.A. 2). The goal is to determine precisely what facts a particular witness is competent to testify to, whether the testimony he can give is relevant and material under the rules of evidence that will govern the trial, how the potential testimony correlates with other evidence, and how the testimony of the witness fits into the lawyer's theory of the case and understanding of the governing law.[28]

[28] An investigating law enforcement agent (or a defense investigator, in most instances) has entirely different purposes in mind when he interviews potential witnesses during the investigatory stage of a case. As a result, his notes are more clearly witness "statements," are less likely to include the mental impressions and personal beliefs of the agent, and do not contain suggestions for trial strategy or legal analysis. For the agent is engaged in the investigation of facts; he is trying to find out what happened and to record the statements of the witness describing what he knows. The agent therefore seeks to uncover all the information that he can having any possible bearing on the case. See H.R. Rep. No. 700, *supra*, at 6.

The agent is after "raw" data; it will be sorted out later, when the pieces of the puzzle are put together and a theory is developed as to what actually occurred. Moreover, the information which he seeks is primarily for the use of others besides himself. Putting the pieces of the puzzle together is invariably a collective effort, and hence the information which he develops must be as complete as possible so that it can be passed on in a comprehensive fashion to the other agents involved in the effort, and ultimately to the prosecutors in order that a prosecutive determination may be made. The information will be further reviewed and studied by the trial prosecutor in order to familiarize himself with the case and make a preliminary determination concerning what evidence is available for presentation at trial.

The agent thus has a reason to make his report as full and detailed as possible. Agents' reports in many instances contain statements, signed or otherwise, which have been written or dictated by witnesses who have been interviewed. Where such statements are lacking and the agent merely reports what the witness said when interviewed, the witness is often quoted substantially verbatim.

Accordingly, the notes taken by the prosecutor are by their nature not the witness's own words taken down in a context that is reliable for use in cross-examination for impeachment. They necessarily reflect trial strategy, legal theories and mental impressions, for they are largely reminders to the lawyer to make sure that no useful area of questioning is overlooked when the witness is on the stand. Such note-taking for the purpose of personal recollection, as we know from common experience, is a highly individualistic matter substantially affected by the habits, particular practice, intellect, and psychological make-up of the note-taker. The notes may take the form (as various entries did in this case) of chronologies, topic headings, cryptic notations, questions, or short conclusory statements, and will often include (again as they did in this case) marginal strategy notations, interlineations, arrows and doodles.[29] Such notes, when tied to the subjective thought processes of the note-taker, will be helpful in aiding him to recall past events but will often be incomprehensible to others—including the witness whose interview led to creation of the notes.[30]

[29] The ABA Standards recognize a "work product" exception for the prosecuting attorney and his staff. ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 2.6(a) (Approved Draft 1970). Among the material protected from disclosure are "notes or outlines of trial strategy * * * and of questions to be asked witnesses * * *" (Commentary to § 2.6, p. 91).

[30] The Second Circuit has recognized that prosecutors' notes, unlike notes taken by F.B.I. or other investigative agents, do not normally reflect the witness's own words and should not be produced for purposes of impeachment. Thus, in *United States* v. *Aviles*, *supra*, 337 F.2d at 559, the court said:

"* * * It would have been grossly unfair to allow the defense on cross-examination to confront Cantellops with the Shaw notes as if they were his own statements. Although courts should show the greatest liberality in making available to the defense any writing which represents what the witness may have said, they must also be meticulous in satisfying themselves that what is made available truly represents the witness' own statements. On the specific facts here presented the latter requirement has not been met.

"Moreover, the inference that government agents are accurate recorders of witnesses' statements is inapplicable in this case. It was not Shaw's aim to provide a record of Cantellops' story, but to draft for his own use a chronological statement which would serve, as well, as a guide in interrogating Cantellops before a grand jury."

See also *United States* v. *Myerson*, 368 F.2d 393, 395–396 (C.A. 2), where the court ruled that 20 pages of "witness sheets"—papers prepared by the government containing the witness's anticipated testimony that were reviewed by the witness before taking the stand—were not statements within the meaning of either subsection (1) or (2) of 18 U.S.C. 3500(e).

These distinctions between the trial attorney's purpose and manner of taking notes and the investigating agent's purpose and manner are significant. The agent is assembling facts with as much precision as possible while the events to which the witness's statement relates are relatively fresh in his mind. See n. 28, *supra*. Indeed, one of the foundations of this Court's decision in *Jencks* was the fact that the agent had recorded the witness's statements close in time to the events in question. As the Court stated: "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events *before time dulls treacherous memory*." *Jencks* v. *United States*, *supra*, 353 U.S. at 667 (emphasis supplied). Since the Jencks Act was designed by Congress to clarify and to avoid expansive readings of the *Jencks* case (*Palermo* v. *United States*, *supra*,

360 U.S. at 350), surely Congress did not intend to require production of a different kind of statement taken at a different time for a wholly different purpose, namely those recorded by prosecutors *after* "time dulls treacherous memory." Such statements (if they can be called that) would be far less valuable for impeaching purposes to test a witness's credibility.

Moreover, to require the production of such material from a lawyer's file, even after trial has begun, may impede thorough pre-trial preparation and "could disrupt the orderly development and presentation of his case." *United States* v. *Nobles, supra,* slip op., p. 13. Knowing that his notes were producible, the lawyer would likely feel obliged either to take full, easily understandable, narrative statements from a witness with whom he talked immediately before trial, or to take no notes at all. While the former would provide a reliable source for impeachment of the witness, they would not serve the lawyer's purpose on the eve of trial: to provide himself with shorthand reminders of areas and events about which he intends to question the witness at trial. Also, the careful preparation of precise notes would be too time-consuming at a time when the lawyer is under great time pressure. Rather than create additional producible material that, because of its length and completeness, is of limited utility to them at trial, many lawyers would choose the alternative of taking no notes at all. This, in turn, could impair the coherence with which cases are presented, to the overall detriment of the judicial system.

2. Production of Attorneys' Notes That Are Not "Statements," Within the Narrow Meaning of that Term, Creates an Undue Risk that Attorneys Will be Required to Testify

The other basic purpose underlying the "work product" doctrine is to prevent the unseemly occurrence of an attorney being forced to become a witness at trial to testify about matters in his file that have been disclosed to his adversary. *Hickman* v. *Taylor, supra,* 329 U.S. at 512–513. The potential for this practice to become prevelant is particularly great in the present context.

Requiring production of an attorney's witness interview notes would create three interrelated problems. In the first place, there would be the necessity for a collateral proceeding to translate or decipher the notes. An investigator's interview report is normally a typed document in narrative form; there can be no question as to what it purports to say. A lawyer's notes, in contrast, are almost always handwritten and, as in this case, quite cryptic. If their production is compelled, the lawyer will be hard put to avoid testifying as to their meaning—if for no other reason than to explain them so they will be intelligible to the jury, or, if his testimony is taken out of the presence of the jury, sufficiently understandable to opposing counsel that they can be used in cross-examining the witness. Second, in contravention of the policies underlying the Jencks Act, such production would permit a witness to be impeached not by his own words but by language used by the attorney, permeated with the attorney's inferences, either in taking the notes in the

first instance or in explaining them to opposing counsel.

Finally, since the attorney's notes will often be in his own cryptic language, there are bound to be verbal inconsistencies between them and the witness's testimony. If the witness denies that the notes correctly reflect what he said in his conferences with the attorney, it will be open to opposing counsel to call the note-taker to the stand to authenticate them and testify to the content of the interview. *United States* v. *Nobles, supra,* concurring op., p. 11, n. 13 (White, J.). Or the attorney himself may feel impelled to take the stand to explain further the meaning of his notes or, in some instances, to contradict his own witness. As Mr. Justice Jackson explained the problem:

> * * * Whenever the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps against that of his

> chief witness, or possibly even his client. [*Hickman* v. *Taylor, supra,* 329 U.S. at 517 (Jackson, J., concurring)].

The credibility of the lawyer, the circumstances under which the notes were taken, and their decipherment would thus become collateral issues to be resolved by judge or jury at trial, thereby delaying, and possibly subverting, a fair and proper resolution of the primary issue in the case.

It was just this kind of potential problem that led the Court in *Hickman* to distinguish between "statements written by the witness and in the possession of the lawyer, and those statements which were made orally by the witness and written down by the lawyer. Production and use of oral statements written down by the lawyer would create a substantial risk that the lawyer would have to testify." *United States* v. *Nobles, supra,* concurring op., p. 11 (White, J.). A similar risk is created by production and use of notes written by a prosecutor and not signed, initialed, or approved or adopted in some formal way by the witness, as we submit the Jencks Act requires. Requiring production of such notes "forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks." *Hickman* v. *Taylor, supra,* 329 U.S. at 513. As stated by Mr. Justice Jackson, concurring in *Hickman* (*id.* at 517):

> Every lawyer dislikes to take the witness stand and and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps

> out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.[31]

The question it was unnecessary to reach in *Nobles,* namely, "whether the policies against putting in issue the credibility of the lawyer who will sum up to the jury outweigh the jury's interest in obtaining all relevant information * * *" (concurring op. of White, J., p. 12), may be resolved in the instant context by defining the term "statement" strictly where lawyers' notes are involved, as we suggest Congress intended in the Jencks Act. Production of such statements is unlikely to inhibit the attorney's trial preparation or performance and will also rarely require that the attorney become a witness; thus, it does not seriously implicate the policies underlying the work product doctrine. A broader sweep through the attorney's notes and files, on the other hand, will activate those concerns and should not be permitted.

[31] Invoking ABA Standards for Criminal Justice, *The Defense Function*, § 4.3(d) (Approved Draft 1971), *amici* suggest that the prosecutor can avoid the risk of testifying by interviewing his witnesses in the presence of a third party, and that he should be required to do so since that onus is placed upon defense attorneys (Am. Br. 33–34). *Amici* do not explain, however, how a third party can translate or authenticate notes taken by the prosecutor himself. More importantly, the ABA Standard they cite refers to impeachment by the defense attorney of an *adverse* witness whom he himself interviews. See ABA Standards for Criminal Justice, *The Defense Function*, *supra*, Commentary to § 4.3(d), p. 231. The prosecutor has the same burden in this respect as does the defense; if he wishes to attempt impeachment of a hostile witness whom he personally has interviewed he must either have had a third party present at the interview or undertake to testify himself. It hardly follows from that proposition that an attorney must interview his own witness only with someone else present, in order to facilitate his impeachment by his adversary. Surely *amici*, who speak of reciprocity, do not suggest that defense attorneys should be required to interview *their own* witnesses in the presence of a third party in order to facilitate impeachment by the prosecution.

3. The Legislative History of the Jencks Act Indicates That Congress Intended to Shield Prosecutors' Trial Preparation Notes From Production

There is a clear relationship between the work product principles discussed above and the policies of the Jencks Act. As previously indicated, Congress purposely defined the term "statement" in a quite narrow way and intended that only those materials falling within that limited definition be produced. The primary reason for the adoption of a narrow definition was, as this Court has recognized, that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." *Palermo* v. *United States, supra,* 360 U.S. at 350. A second reason for the narrow definition was the congressional fear that "disclosure of * * * [an] agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest * * *." *Ibid.* See also H.R. Rep. No. 700, *supra,* at 3. Yet a third reason, especially pertinent to this discussion, was the concern that a government trial lawyer's notes made

in preparation for trial not be routinely disclosed to the defense.

It is recognized that the Jencks Act was motivated largely by the fear that this Court's decision in *Jencks* was being given an overly expansive reading by the lower federal courts. See *Palermo* v. *United States, supra,* 360 U.S. at 350. Congress intended by the legislation to correct the "widespread misinterpretations and popular misunderstandings of the opinion in the Jencks case." S. Rep. No. 981, *supra,* at 3. Cited by the Senate Judiciary Committee as among the "unusual demands for production presuming on the authority of Jencks [which] illustrate the boldness of the attempts to enlarge the decision" (*id.* at 9) was "a narcotics case in the [S]outhern [D]istrict of New York, [in which] the defense demanded the notes made by the assistant United States attorney in preparing his case for trial" (*ibid.*). Congressman Keating of New York, a manager of the legislation on behalf of the House of Representatives, also made reference to that case as one of the misapplications of the *Jencks* decision by the lower federal courts, which, he stated, the legislation would rectify. 103 Cong. Rec. 16118 (1957).

Another indication that Congress intended to exclude prosecutor's notes is found in the debate over whether the term "statement" should be defined, *inter alia,* as "any transcriptions or *records* of oral statements made by the witness to an agent of the Government," or "any transcriptions *and recordings*" of such statements. 103 Cong. Rec. 15930 (1957) (emphasis supplied). Senator Hruska supported the use

of the word "recordings" because he feared that the term "records" might be interpreted to require the production of memoranda made by government attorneys of their interviews with witnesses whom they had prepared for trial. As he said (103 Cong. Rec. 15931 (1957)):

> * * * No careful lawyer ever puts a witness on the stand without interrogating the witness as to the ground he can cover legitimately in the testimony in the case at hand. In the process of interviewing the witness, if the lawyers are at all careful and if they follow the pattern which has been followed for many, many years, they will make a memorandum as to what the witness said to them, which is their understanding of what the witness said he would cover in the testimony. It is submitted that the word "records" would extend even to such memorandums, for which the witness is not responsible, since he is not the one who wrote them and he is not the one who set them down on paper. Those memorandums would be available for the purpose of impeaching the witness.
>
> It would seem to me not to be in keeping with the purpose of the proposed legislation to have a witness impeached by material for which he himself was not responsible.

The definition of "statement" ultimately agreed upon in conference—in order to "remove any doubt as to the kinds of statements affected by the bill" (H.R. Conf. Rep. No. 1271, *supra,* at 3)—used the word "recording," as proposed by Senator Hruska. Since a primary reason for using that word was to avoid pro-

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duction for impeachment purposes of the trial lawyer's memorandum of his witness interview, it follows that such memoranda and notes should not be held producible under the Jencks Act.[32]

In sum, as the Second Circuit has recognized, the "legislative history strongly indicates that one evil Congress sought to remedy in passing the Jencks

[32] The Jencks Act can be read to include only statements given to a government investigative or law enforcement agent during an investigation, and not those given to a government trial attorney in preparation for trial. Congress expressly and purposely "limit[ed] the types of statements and reports which come under the provisions of the bill to statements of Government witnesses or prospective witnesses * * * *made to an agent of the Government* * * *." H.R. Conf. Rep. No. 1271, *supra*, at 3 (emphasis in original). The statute itself included this language. Since the Jencks statute was intended to limit, not expand, the scope of the *Jencks* case, which involved statements to F.B.I. agents, Congress' use of the term "agent of the Government" was intended to require production only of statements of witnesses made to investigative agencies, not those given to prosecutors in preparation for trial. See H.R. Rep. No. 700, *supra*, at 3. Indeed, Senator Javits, in proposing the addition of the words "to an agent of the Government," stated that "this bill is intended to relate only to statements or reports of Government agents, and *we understand those to mean enforcement officials.*" 103 Cong. Rec. 15927 (1957) (remarks of Senator Javits) (emphasis supplied). See also *id.* at 16115 (remarks of Representative Willis); *id.* at 15916 (remarks of Senator O'Mahoney). In common parlance, a government trial attorney is not considered an "enforcement official."

While the language "to an agent of the Government" was deleted in 1970 when the Jencks Act was amended to add grand jury statements to the statutory definition of statement (Pub. L. 91–452, Title I, Section 102, 84 Stat. 926), petitioner himself correctly recognizes (Br. 35) that this amendment was made only to expand the production requirements to include grand jury statements and was not intended "to otherwise limit" the "disclosure requirement of the statute."

Act was the possible production of notes made by government attorneys in preparing their case." *United States* v. *Crosby*, 294 F.2d 928, 951 (C.A. 2).[33] Moreover, even those members of Congress who urged a broader standard of producibility than that finally enacted did not express the view that government trial attorneys' notes need be produced under the Act, nor did they disagree with the concerns expressed by Senator Hruska, Congressman Keating, and others that it would be unfair and an expansive reading of the *Jencks* case to require production of trial preparation notes for use in impeaching government witnesses. Nor is there any indication that this Court in *Jencks* intended to abandon the concerns it earlier had expressed in *Hickman* v. *Taylor*.[34]

D. THIS COURT SHOULD REJECT PETITIONER'S SWEEPING NOTIONS OF WHAT CONSTITUTES A PRODUCIBLE STATEMENT

The record in this case, as it now stands, establishes certain basic facts about the prosecutors' notes created during the course of their extended interviews of

[33] See also this Court's comment in *Palermo* v. *United States*, *supra*, 360 U.S. at 359–360, where it pointed out that the House Report (H.R. Conf. Rep. No. 1271, *supra*) indicated that "a very restrictive standard is to be applied" in determining whether notes of what a witness said are to be produced when those notes are not verbatim recordings, or nearly so.

[34] The cases that have rejected the notion that there is a work product exception to the Jencks Act for the prosecutor's trial preparation notes have not considered the legislative history, as we have here, or analyzed the relationship between *Hickman* and *Jencks*. See, *e.g.*, *Saunders* v. *United States*, 316 F.2d 346, 349–350 (C.A.D.C.), certiorari denied, 377 U.S. 935; *United States* v. *Hilbrich*, 341 F.2d 555, 557 (C.A. 7).

Newman immediately prior to and during the trial: the notes are not a substantially verbatim record of Newman's own words; they are not a coherent, organized account in narrative form of what Newman saw, heard, or did; they were not read over by Newman and signed by him or formally adopted as his statement; they were not made for the purpose of recording precisely Newman's account of events so that he and others might in the future be able to refer to them in reconstructing those events (*i.e.*, for the purpose of recording and preserving as accurately as possible his past recollection), but were instead taken to aid the prosecutors in their preparation for and conduct of the trial. Under the arguments we have adduced above, these facts require the conclusion that the notes were not producible under the Jencks Act.

Petitioner, relying principally on *Campbell* v. *United States*, 373 U.S. 487 (*"Campbell II"*), urges a far broader definition of producible statements under the Jencks Act, under which virtually any writing whose contents have been disclosed to the witness and the general correctness of which the witness has verified would be deemed a prior written statement of the witness producible under Section 3500(e)(1) as "otherwise adopted or approved."[35] Even if it is disposed to consider doing so, the record in this case is presently too sparse to permit the Court now to set forth upon the path petitioner invites it to travel. There are, moreover, compelling reasons for declining

[35] In addition to relying on *Campbell II*, *amici* also cite *Clancy* v. *United States*, 365 U.S. 312, 315–316, for the proposition that, since the notes were assertedly adopted by Newman, they did not have to be a verbatim recital of his oral statements (Am. Br. 11). But in *Clancy* the investigating agents themselves testified concerning conversations which they had had with certain defendants; the statement at issue was a memorandum which they had prepared reflecting those conversations. The situation was thus parallel to that in *Nobles*. The memorandum was producible for impeachment *of the agents* because it constituted their direct prior statement about the conversations; it did not have to contain a verbatim recital of what the defendants had said, because it was not produced to impeach the defendants. The "adoption" in the case occurred because the memorandum was written by one agent (upon the basis of notes prepared by the second) and was merely signed by the second. For *Clancy* to be applicable to this case, Newman would have had to have been a defendant, the prosecutors would have had to testify against him concerning admissions he made to them, and one of the prosecutors would have had to have written a memorandum based on the notes, which the other prosecutor merely signed.

to travel this route and refusing to extend *Campbell II* to prosecutors' interview notes.

1. Unless this Court is prepared to order virtually *carte blanche* access to an attorney's witness interview notes, it can render no decision in favor of petitioner on this record. Any attempt to articulate standards for determining the producibility of non-verbatim interview notes and to define what actions constitute "adoption" or "approval" on this record would necessarily entail abstract and hypothetical rule-making; for we do not presently know what statements we are talking about or how such statements may be said to have been "adopted or approved" by this witness. Virtually all that is now known is contained in the following brief exchanges:

> Q. So you met with the Government representatives on May 12, is that right?
>
> * * * * *

A. Yes, I met with the Government on May 12th.[36]

Q. And did you discuss what your testimony would be here?

A. Yes.

Q. Who did you discuss it with?

A. Mr. Lebowitz, Mr. Keilp.

Q. And did they take notes or jot down anything at all of what you were saying?

A. Yes.

Q. There wasn't a reporter present?

A. No.

Q. And as they took notes, did they sometimes question you about what you had just said to make sure that they got it down correctly?

A. They may have. I don't really remember that that was part of the pattern.

Q. All right. * * * [App. 90–91].

* * * * *

Q. When was the next time you met with them?* * *

A. * * * I believe the weekend of June 9th and 10th I was also here at Phoenix. * * *

Q. Who did you meet with in the Government's office?

A. Mr. Lebowitz and Mr. Keilp.

Q. Did you discuss your testimony?

A. With Mr. Lebowitz and Mr. Keilp?

Q. Yes.

A. Yes.

Q. Was a reporter there?

A. No.

[36] The actual date was May 13, 1973. See App. 91.

Q. As you were explaining—or discussing your testimony, did anyone take notes?

A. The two gentlemen took notes.

Q. Were they occasionally read back to you to see whether or not they correctly understood what you were saying?

A. Probably from time to time.

Q. All right, sir. Did you either correct them or say, "Yes, that's right," or "No, that's not right because it went this way, I believe," words to that effect?

A. Yes, that would happen. [App. 91–92.]

It can hardly be said that this establishes any kind of adoption by the witness of the words written by the prosecutors, let alone a sufficient adoption to transmute their words into a statement of Newman's. Unanswered questions abound. Were notes read back to Newman every time he met with the prosecutors, or only on June 9 and 10?[37] Were all of the notes actually read back verbatim to Newman? Were any of them? If some, which ones? Were Newman's comments regarding the prosecutors' notes ever addressed to the precise language used rather than to the general factual accuracy of their content? To the extent Newman did suggest corrections, were they then in fact incorporated in the notes by the prosecutors? If they were, were the notes as corrected reread to the witness? Indeed, which of the notes were even in exist-

[37] Newman met with the prosecutors on May 13, 1973, June 9, 10, 16 and 17, and "portions of each day since" through June 26 (App. 93). He also spent an additional five or six hours a day in the prosecutors' office between the completion of his testimony during the government's case-in-chief and the beginning of his rebuttal testimony (App. 110).

ence at the time of Newman's direct testimony and the defense production request?

It would be most unwise, we believe, for this Court to attempt to establish standards for defining "adoption or approval" without knowing the answers to questions such as these. Moreover, when answers are available for this case, this witness, and these notes, we suspect they will show that the holding of the court of appeals was correct under virtually any standards this Court might be likely to adopt. Accordingly, if the Court finds any merit in the contention that attorney interview notes that are not verbatim renditions of the witness's statements and that have not been read and signed by the witness for the purpose of adoption may nevertheless be held producible, sound decision-making requires that it follow the course adopted in *Campbell* and remand for a hearing before the district court at which answers to the questions set forth above can be obtained. See *Campbell* v. *United States,* 365 U.S. 85 (*"Campbell I"*). (If the Court adopts our views as set forth earlier in this brief, no such remand would be required, since it is already clear from the record that the notes do not constitute producible statements under the standards we propose.)

2. The foregoing discussion of the possible need for a remand in this case is not, of course, intended to suggest that this kind of hearing needs to be or should be held in every case in which an attorney has interviewed one or more of his witnesses in preparing for trial and has taken notes of what the witness has told

him. Indeed, one of the major drawbacks to acceptance of the broad definition of "statement" that petitioner urges is that it would lead to a collateral inquiry in virtually every case in which an attorney has interviewed his witnesses before trial and taken notes of the interviews. Because of the purpose for which such notes are taken and their generally cryptic nature, they would not be routinely produced even under the broadest definition of "statement" reasonably foreseeable. Rather, there would always be questions about how complete the notes were, whether and how the notes were read back to the witness, precisely how they were adopted or approved by him, and, if isolated fragments of the notes can constitute "statements," what portions of the notes were so approved.

Moreover, if isolated fragments of notes can constitute adopted or approved statements within the meaning of the Jencks Act, as petitioner suggests, it will almost always be necessary for the government trial attorney to testify about what occurred at the witness conference, what portions of the notes were read back to the witness, how the witness responded, and what the isolated fragment means in the context in which it was written by the lawyer. Finally, even if an isolated fragment was "adopted or approved," there will be a separate question in each case as to whether it is fair to use such a "statement," out of context, for impeachment purposes, or whether the surrounding material must also be produced—even though it contains the attorney's words, not the witness's—in order to give the fragment some meaning.

We suggest that this kind of collateral inquiry can be avoided by defining the term "statement" in the strict fashion that Congress intended, thereby also giving effect to the attorney work product policies underlying the Jencks Act. Since this narrow definition of "statement" requires production of only a relatively clearly defined category of materials, all that should be necessary when attorney's notes are at issue is a representation from the attorney as to whether his notes contain any continuous, narrative, substantially verbatim statements of the witness, any statements actually written by the witness, or any statements virtually dictated by the witness word-for-word and then read by or to the witness and signed, initialed or formerly approved by him. If, as in this case (App. 98), the attorney represents that there is no such material in his file, the inquiry would be at an end; if, on the other hand, he does have material of this nature, he would produce it.

In those few cases where there is some question in the attorney's mind as to whether material in his file is a "statement," he would submit the questionable portion to the court for an *in camera* inspection. But if the strict definition of "statement" that we urge for attorneys' interview notes is accepted, such borderline cases will arise infrequently, and, when they do, a brief *in camera* inspection or inquiry will nearly always be sufficient to resolve the matter. There will rarely be need to take extrinsic evidence from the prosecutor and the witness, because the nature of the inquiry will be so limited that the

material on its face usually will fall within or without the definition of "statement." Moreover, if the guidelines are as clear as those we propose, a prosecutor's representations as to whether there are Jencks Act "statements" in his file will suffice in lieu of testimony because the prosecutor—"who is an officer of the court as well as of the United States"—can be expected to conduct the government's case responsibly and "in a manner consistent with basic legal ethics and professional care." *Campbell I, supra,* 365 U.S. at 103 (opinion of Frankfurter, J.).

Thus, in this case, the prosecutor represented to the district judge (App. 98) that his notes reflected only "substances of conversations * * *. They were not taken down verbatim. They were not shown to [Newman] * * *. Nobody was asked to sign them in the form of a signed statement * * *." This representation by the prosecutor was sufficient to demonstrate that the notes were not a written statement made by Newman and were not adopted or approved by him, within the meaning of 18 U.S.C. 3500(e)(1). They were therefore not producible under the Jencks Act.

3. Finally, there are significant distinctions between this case and *Campbell II,* upon which petitioner relies as authority for his sweeping notion of what constitutes a producible statement.

While the agent in *Campbell* did not write down a substantially verbatim account of everything the witness told him, the notes were "complete * * * with respect to the pertinent information" (373 U.S. at 489). Here, as we have demonstrated, there was no

attempt to make notes that could in any sense be considered "complete," because the attorneys' purpose in taking the notes, unlike the investigator's, was to provide shorthand aids for his own use at trial. Moreover, in *Campbell*, the agent read back to the witness not merely the substance of the notes but "the precise words" contained therein, "and to achieve this correspondence [the agent] looked down at the jottings each time before he uttered a sentence;" the witness then said that what the agent had read was correct. *United States* v. *Campbell*, 199 F. Supp. 905, 906 (D. Mass.). Here, the prosecutors did not read back the "precise words" of their notes or look down at them each time before communicating with Newman, because their purpose, unlike the investigator's in *Campbell*, was not accurately to capture Newman's factual account of events in Newman's own words so that he and others might later be able to refer to them in order to reconstruct those events.

At most, the record shows that Newman occasionally verified or corrected the prosecutors' understanding of the *facts* (see App. 90–92); there is no indication that he verified, authenticated, corrected or made changes in the actual *language* used by the prosecutors to enter their understanding of the facts into their notes, so that the statement properly could be considered Newman's own. An effort by the prosecutors to get Newman's version of the facts clear in their minds before they made entries in their notes does not indicate that the witness approved or was even aware of the language or phraseology used in

taking the notes, as was the case in *Campbell*. *Campbell* did not hold, as petitioner and *amici* suggest (Br. 42; Am. Br. 11), that a totally nonverbatim recital of a witness's oral statement becomes the witness's written statement if it is "adopted" by him, by having portions of the facts contained therein occasionally read back to, or checked with, the witness. For a partial reading back and verification is insufficient to transform another's notes into a written statement "adopted or approved" by the witness. See *United States* v. *Smaldone*, 484 F. 2d 311, 317–318 (C. A. 10); *United States* v. *Scaglione*, 446 F. 2d 182, 184 (C.A. 5), certiorari denied, 404 U.S. 941.[38]

[38] The facts in *Smaldone* are strikingly similar to those in this case. As here, every "investigative statement" given by the witness had been turned over to the defense, but the notes "made by the Assistant U.S. Attorney on a yellow pad" during a conference a few days before the witness testified were not produced (484 F. 2d at 316). When asked whether the Assistant United States Attorney "would read them [the notes] back to him on occasion to make sure that they were accurate," the witness responded: "Sometimes" (*ibid.*). The district judge declined defense counsel's request for production of the yellow pad.

The court of appeals affirmed. It held that the notes were not a "statement" within the Jencks Act because it was not established whether the answers read back to the witness by the prosecutor "were verbatim or substantially so * * *. We are not disposed to react on any ritualistic basis merely because there was some reading back" (484 F. 2d at 317). "The fact that there is a partial reading back and verification does not necessarily render the material a statement" (*id.* at 318).

In *Scaglione*, the court acknowledged "the possibility that the witness may adopt or ratify an interview report in a piecemeal manner by response to a number of inquiries as effectually as by a single generalized response" (446 F. 2d at 184). Relying on *Palermo*, the court said that the important question "is whether

Thus, it is apparent that petitioner seeks to have this Court not merely apply *Campbell* to a factual situation that is not on all fours, but significantly to extend it to require production, as a witness's own written statement under 18 U.S.C. 3500(e)(1), of the language of another never seen, authenticated or verified by the witness himself. Whatever the merit of the *Campbell* decision on the facts then before the Court, any such extension would be a sharp departure from the congressional intention, previously discussed, strictly to limit the kind of material that would be producible under the Jencks Act to assure that a witness cannot be impeached by a summary of an oral statement which is neither a substantially verbatim recital of what he has said or a writing which he has seen and formally accepted as correct. Moreover, there is serious question whether *Campbell* ought ever to be applied to attorney's notes, as opposed to an agent's report, because, as we have demonstrated, an attorney interviewing a witness in preparation for trial has no reason either to record and preserve the precise language of the witness as accurately as possible or to verify that language with the witness.

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the witness has made as his own 'the product of the investigator's selections, interpretations and interpolations,' *Palermo* v. *United States* [*supra*, 360 U.S. at 350], so that the defense should be permitted to use it to impeach him. If the witness has not done so it is grossly unfair to use the language, interpretations and interpolations of someone else to impeach him" (446 F. 2d at 184). The court concluded that the district judge's finding, that the witness did not adopt the interview reports, was not clearly erroneous.

Finally, we cannot help but question the continuing vitality of the *Campbell* approach in this post-*Brady* era. In *Campbell,* there appeared to be a significant contradiction of material fact between the witness's trial testimony and what he was reported by the agent to have said when interviewed. While the Court reiterated its view that no showing of inconsistency is a prerequisite to the production of documents under the Jencks Act (373 U.S. at 497, n. 13), its decision, we suspect, was based in part on its concern that it would be unfair to deny production of the statement there in issue. It may be that, were the situation presented by *Campbell* considered today, the Court would not strain the definition of "statement" contained in 18 U.S.C. 3500(e)(1), but would inquire instead whether portions of the report were producible under *Brady* v. *Maryland, supra,* and *Moore* v. *Illinois,* 408 U.S. 786.[39]

II. THE NOTES WRITTEN BY NEWMAN HIMSELF WERE NOT PRODUCIBLE UNDER THE JENCKS ACT

The petition for a writ of certiorari in this case was granted to consider whether the Jencks Act contains an "attorney's work product exception" that makes non-producible an attorney's notes of conversations with a witness. However, included among the notes in the prosecutors' files in this case, which were reviewed by the court of appeals, are 40 pages of material written by witness Newman himself. It appears

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[39] The *Brady* doctrine was only two weeks old at the time *Campbell II* was decided.

that the question of the producibility of those notes is beyond the scope of the grant and turns upon different considerations. There is no reason to believe that the law regarding producibility of a witness's own writings in the possession of the government is in serious doubt or that such an issue is recurring or important. Accordingly, it seems unnecessary for this Court to consider the relatively unimportant question whether the particular notes written by the witness Newman in this case, or any part of them, are in fact producible statements.

We recognize that petitioner, not having seen the packet of notes at the time he filed his petition, had no way of knowing that any of them were written by Newman himself. Had he been aware of this fact, he may have presented a broader or additional issue for the Court's consideration (although we question whether the Court would have granted certiorari on that aspect of the case). Indeed, we first became aware that some of the notes were written by Newman himself during the preparation of the brief in this Court. As we discuss below, it seems clear from simple inspection of the notes and review of the course of events at trial that there is little in them that was even arguably producible. In order to permit petitioner to make relevant arguments as to the producibility of the Newman notes, the Court may wish to remand to the district court for further consideration of this issue. For reasons we now discuss, however, we think such a remand unnecessary.

A. Included among the Newman notes is a seven-page narrative (pages 232–238) relating to the activ-

ities of Paradine and his contacts with both Newman and petitioner. This appears to be a "statement" within the meaning of the Jencks Act. However, petitioner made his demand for production only once—at the conclusion of Newman's direct testimony during the government's case-in-chief. Thus, the statement was not producible unless it existed at that time—a doubtful proposition, since the statement was prepared for use in cross-examining Paradine when he testified for the defense. Even if the statement did exist, however, it would not have been producible after Newman's direct testimony in the government's case-in-chief, because, as is evident from examination of the trial transcript, none of Newman's testimony to that point pertained to Paradine. See 18 U.S.C. 3500(b), (c). It was not until Newman testified on rebuttal that the statement became germane and hence subject to production. At that point, however, petitioner made no demand for Jencks Act statements. See App. 110; Tr. N–419—N–424. Under subsection (b), a witness's prior statement is producible only "on motion of the defendant." It follows that production of the statement was waived. Cf. *United States* v. *Wisener,* 494 F.2d 516, 517 (C.A. 5).

In any event, the seven-page narrative statement related solely to the activities of Paradine. But before Newman really got into that part of his rebuttal testimony, which was directed toward refuting Paradine's testimony for the defense, petitioner objected that Paradine had never testified concerning the matters that Newman was purportedly rebutting. The court cut the line of testimony short until the govern-

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ment could show from the transcript that it comprised proper rebuttal testimony (see App. 108–110). The prosecutors never returned Newman to the subject. As a result, only seven pages of Newman's 132-page rebuttal testimony pertained to Paradine (App. 101–107; Tr. N–337—N–469), and inspection of the seven-page narrative statement written by Newman shows that only one and a half pages relate to that testimony.

As this Court has said: "[T]here can be no complaint by a criminal defendant that he has been denied the opportunity to examine statements by government witnesses which do not relate to the subject matter of their testimony * * *." *Scales* v. *United States,* 367 U.S. 203, 258. Moreover, the small segment that is related is totally consistent with Newman's rebuttal testimony. Accordingly, considering the length of the trial and the lack of any inconsistency, the failure to produce a one-and-one-half page statement that related only to an aborted line of rebuttal testimony was, if error at all, harmless error.

B. An examination by this Court of the remainder of the notes handwritten by Newman—a total of 33 pages—will demonstrate that few, if any, are in fact "statements" within the meaning of the Jencks Act.

Twenty pages of the notes (pages 126–129, 131–146) appear on their face to be questions prepared by Newman for the prosecutors to use in cross-examining petitioner; one page (page 147) is a chronology of events in outline form, some entries being no more than a word or two or an abbreviation;

four pages (pages 224–227) contain Newman's analysis, with page references, of an official report prepared by Paradine, who appeared as a defense witness; and three pages (pages 18–19, 208) contain outlines suggesting how the prosecutors should present their case to the jury. These 28 pages of the Newman notes are not "statements" but, rather, are proposed questions and analyses of information for use by the prosecutors in cross-examining petitioner and Paradine. They do not state what Newman asserted the facts to be; they simply contain specific questions and other suggestions of means by which the prosecutors could test the factual assertions made in court by petitioner and Paradine. Two additional pages (pages 228 and 231) each contain a few words that convey no coherent meaning.

Thus, none of these 30 pages of notes constitute material that could properly be set against Newman's trial testimony to develop inconsistencies between them and the factual assertions he made from the witness stand, and it is therefore readily apparent that they are not "statements" within the meaning of the Jencks Act.[40] Accordingly, the conclusion of the

[40] A related "work product" consideration militating against production of such material is that the inevitable result of production at the time of Newman's direct testimony would have been to advise petitioner and his witness of precisely what they could expect on cross-examination, thereby enabling them to tailor their testimony accordingly. Moreover, while Newman was the last government witness in this case, a witness like Newman who has aided the prosecution in its preparation may well be one of the first witnesses in another case. Disclosure, when such a witness completes his testimony, of proposed orders of proof, questions for other pros-

court of appeals (App. 120), that none of the notes that it examined were statements under 18 U.S.C. 3500(e), should be affirmed.[41]

C. Should this Court conclude that an inspection of the notes handwritten by Newman does not provide convincing evidence that they are not statements within the meaning of the Jencks Act, or should the Court be unwilling to conclude on the present record that the failure to produce the notes, if error, was harmless, it will be necessary to remand the case to the district court to consider the Newman notes.

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ecution or defense witnesses, or analyses of forthcoming exhibits which the witness has prepared would provide the defense with premature insights into the prosecution's case that could only be disruptive to its orderly development and presentation.

[41] The remaining three pages of the Newman notes (pages 130, 229–230) are accounting analyses. We concede that such analyses may in some circumstances be "written statements" of a witness within the meaning of 18 U.S.C. 3500(e)(1), and would be producible at trial after the witness has testified on direct examination, if the accounting analyses "relat[e] to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)). See also *United States* v. *Nobles*, *supra*, slip op., p. 14; cf. *Clancy* v. *United States*, *supra*. But here, an examination of the trial transcript shows that Newman did not testify about the facts contained in the accounting analyses except in a most general way. Moreover, judging from the fact that page 130 immediately precedes 16 pages of proposed questions for cross-examination of petitioner, and pages 229–230 are in the midst of pages relating to the witness Paradine, it is not even clear that these analyses were in existence at the time of Newman's testimony in the government's case-in-chief. Finally, despite the fact that petitioner was given a copy of the Newman notes to inspect in conjunction with the preparation of his brief in this Court (see p. 14, n. 9, *supra*), he has failed to suggest any inconsistencies between the accounting analyses and Newman's trial testimony. In these circumstances and in the context of a seven-week trial, the error, if any, in failing to produce them is harmless.

The first question to be resolved by the district court if there is to be a remand hearing is which, if any, of the notes handwritten by Newman were even in existence at the time petitioner made his Jencks Act request during cross-examination of Newman when he appeared in the government's case-in-chief (App. 93–94). For if the Newman notes were not in existence until after Newman's testimony, there could be no violation of the Jencks Act by not producing the notes for use by petitioner in cross-examining Newman.

The next question for resolution at the remand hearing is which of the notes—if any were in existence at the time of the demand—are "statements" within the meaning of the Jencks Act. As we have indicated, our own examination of the notes persuades us that very few of them, if any, are in fact "statements." However, if, contrary to our analysis, the district court should conclude on a remand that some of the Newman notes constituted "written statements" within 18 U.S.C. 3500(e)(1), it would next have to compare the notes with Newman's direct testimony at trial to determine whether any portion of the notes "relates to the subject matter as to which [Newman] has testified" (18 U.S.C. 3500(b)). Because the notes were intended largely to aid the prosecutors in their cross-examination of petitioner and Paradine, it is likely that such a comparison would show that few, if any, of the Newman notes related to Newman's direct testimony during the government's case-in-chief. If only a small portion would have been pro-

ducible for petitioner's use on cross-examination, the district judge may well conclude that, in the context of a seven-week trial, failure to produce the notes was harmless error.

III. THE NOTES OF THE GOVERNMENT TRIAL ATTORNEYS AND OF THE GOVERNMENT WITNESS WERE NOT PRODUCIBLE UNDER EITHER THE FIFTH OR SIXTH AMENDMENT TO THE CONSTITUTION

A. THE PROSECUTOR'S NON-PRODUCTION OF THE NOTES WAS NOT A *BRADY* VIOLATION

This Court's decision in *Brady* v. *Maryland*, 373 U.S. 83, recognized that it is a violation of due process for the prosecution, in the face of a defense request, to suppress evidence that is "favorable to the accused and is material either to guilt or to punishment." *Moore* v. *Illinois*, 408 U.S. 786, 794. While the terms "favorable" and "material" have not been defined by the Court, we think it plain that the basic import of *Brady* is not that there is some abstract right on the part of a defendant to obtain all evidence possibly helpful to his case even in the most tangential way, but only that he is entitled to evidence of central importance that is likely to affect the outcome of the case. Thus, *Brady* does not require, as petitioner argues (Br. 61, 64), the production of any materials "which are not technically statements within the meaning of 18 U.S.C. 3500(e)" but are nevertheless "favorable" in that they would be helpful in testing "credibility." Were *Brady* so read, there would be nothing left of the carefully constructed Jencks Act,

with its limited definition of "statement." For all "materials," whether or not statements under Section 3500, would thereby become producible under *Brady* because possibly helpful in attacking a witness's credibility.[42]

The Jencks Act affords the defendant the opportunity to confront a government witness with discrepancies in language between his prior statements and trial testimony, to point up even minor differences in emphasis and the like.[43] As McCormick has pointed out:

> The theory of attack by prior inconsistent statements is not based on the assumption that

---

[42] The cases upon which petitioner relies (Br. 59–62) are inapposite. *United States* v. *Wilkins*, 326 F.2d 135 (C.A. 2), held that it was a violation of due process for the prosecution to fail to disclose the existence of witnesses who would have testified that the defendant was not the person involved in the robbery. Clearly, such evidence is highly favorable to the accused and material to the issue of guilt. No such evidence is involved here.

United States v. *Bryant*, 439 F.2d 642 (C.A.D.C.), involved a tape recording of the offense itself (a narcotics transaction). The recording was thus direct physical evidence of the commission of the offense, which the court of appeals held was discoverable under Rule 16(b), Fed. R. Crim. P. See 439 F.2d at 649. Notes that reflect a witness's prior utterances, on the other hand, are not producible if they do not constitute Jencks statements and are certainly not direct evidence of the commission of the offense.

Finally, petitioner's reliance on *United States* v. *Wright*, 489 F.2d 1181 (C.A.D.C.) is particularly curious, since that case was effectively overruled by this Court in *Nobles*.

[43] The *Jencks* decision was "not required by the Constitution" (*Scales* v. *United States*, *supra*, 367 U.S. at 258), and it was not cast in constitutional terms. *Palermo* v. *United States*, *supra*, 360 U.S. at 345. Neither the decision nor the statute set forth constitutional requirements. *United States* v. *Augenblick*, 393 U.S. 348, 356.

> the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements. [McCormick, *Evidence,* § 34, p. 68 (2d ed. 1972).]

The purpose of *Brady* is significantly different. The concern in that case was with practices rightly deemed so fundamentally unfair as to deprive a criminal defendant of due process of law. Under *Brady,* the question is whether there are specific *facts* in the prosecutor's file that are material to the issue of guilt and favorable to the defendant, in that they are actually exculpatory.

The difference in purpose between the Jencks Act and the *Brady* decision is relevant to the procedure to be followed in each case. Since under the former, a defendant is entitled to attempt the potentially helpful process of impeaching credibility by showing inconsistencies in language, he is entitled to inspect any prior statement reflecting the witness's actual words in order to undertake that process. But because *Brady,* based as it is upon due process concepts, requires only disclosure of actually exculpatory *facts,* the defendant has no right under *Brady* to production of material that does not contain such facts.

Certainly the defense is not entitled to decide for itself, by inspecting the prosecutor's file, whether matter contained therein is favorable and material and therefore should be produced. While this Court's opinion in *Brady* did not specify whether the prosecutor, the defense or the trial judge is to determine what information in the prosecutor's file is "exculpatory" and therefore producible, no court has held that it is a defense determination. Otherwise, as *amici* candidly suggest (Am. Br. 38, n. 5), *Brady* would require an "open file policy"—one of the very evils that Congress sought to counter by enacting the Jencks Act. No court has suggested that the rule of *Brady* requires the prosecution to open its files to the defense to search for all information that is possibly helpful. Cf. *Moore* v. *Illinois, supra,* 408 U.S. at 795; *United States* v. *Fioravanti,* 412 F. 2d 407, 410–412 (C.A. 3).

Nor have any courts adopted *amici's* suggestion (Am. Br. 39) that the trial judge should inspect the prosecutor's file *in camera* to determine whether material therein is producible under *Brady*; those that have considered it have held to the contrary. See *United States* v. *Harris,* 409 F. 2d 77, 80–81 (C.A. 4); *United States* v. *Frazier,* 394 F. 2d 258, 262 (C.A. 4), certiorari denied, 393 U.S. 984; *Archer* v. *United States,* 393 F. 2d 124, 126 (C.A. 5). *Amici* have offered no authority for the proposition that this is properly a determination for the trial judge.[44] We

[44] The cases cited by *amici* (Am. Br. 39) merely note that inspection of specific items was undertaken by the trial courts; they do not hold that such inspection was required. Indeed, *United States* v. *Davis,* 487 F. 2d 112, 122 (C.A. 5), certiorari denied, 415 U.S. 981, while noting that one item was inspected (and eventually produced as a *Jencks* statement rather than as *Brady* material), held that other items—which apparently were not inspected—were not compellable under *Brady.*

submit that after a meaningful defense request for *Brady* material, the representation of the prosecutor that there is no such material in his file is to be accepted by the Court (*Archer* v. *United States, supra,* 393 F. 2d at 126). There is no more reason to require a trial court to look behind a prosecutor's representation that there is no undisclosed *Brady* material in his file than there is to look behind the prosecutor's representation that he has produced all of the prior statements of witnesses in the government's possession."[45]

Finally, it is significant that petitioner's counsel was provided with a copy of the notes prepared by the prosecutors and by Newman during the course of the preparation of his brief in this Court, yet he has failed to point to any contradiction between what is recorded therein and the government's evidence at trial.[46] In any event, he now has the notes; if there is any evidence favorable to petitioner and material to

[45] *Amici* misstate the record when they assert that "the prosecutor never represented to the trial court that the subject notes contained no *Brady* material" (Am. Br. 39), as does petitioner when he claims that the prosecutor did not respond to his request for a disclosure of whether there were any conversations or side agreements with Newman concerning how the latter could plead (Br. 55, n. 27). The record shows that the prosecutor—in response to petitioner's oral motion under *Brady*, *Giglio* v. *United States*, 405 U.S. 150, and *Giles* v. *Maryland*, 386 U.S. 66, for the production of any exculpatory or favorable evidence in the government's possession—represented that "we have produced everything that we are aware of" (App. 99–100). This was clearly a representation that there was no *Brady* material in the notes or any place else and that there were no undisclosed agreements concerning Newman's plea.

[46] Since an examination of the notes shows that there is no contradiction between Newman's testimony and what he said to the prosecutors, it is not necessary in this case to decide if such a contradiction would be *per se* "exculpatory" in the *Brady* sense. We point out that there was more than a mere "contradiction" in both *Giglio* v. *United States*, *supra*, and *Napue* v. *Illinois*, 360 U.S. 264. The due process violation in both cases was that the prosecutor, in one instance negligently and in the other knowingly, allowed perjurious testimony by a prosecution witness to stand uncorrected. See 405 U.S. at 153–154; 360 U.S. at 269.

the issue of guilt, he is free to bring it to the attention of the district court in a motion for new trial based upon newly discovered evidence."[47]

B. THERE WAS NO SIXTH AMENDMENT VIOLATION

The arguments based upon the Confrontation and Compulsory Process Clauses of the Sixth Amendment, raised for the first time in this Court, afford no more assistance to petitioner's and *amici's* position than do their Fifth Amendment contentions.

1. Petitioners' argument based upon the Confrontation Clause (Br. 69–73) appears to be that "a failure to provide material to which a defendant is en-

[47] Petitioner also suggests that the plea bargain between Newman and the prosecutors was other than that represented by Newman in his trial testimony. We reiterate (see p. 8, n. 3, *supra*) that since this Court did not grant certiorari on the question raised in the petition concerning the plea bargain, it is not open to petitioner to raise the question here. In any event, the fact that Newman was placed on probation after being permitted to plead guilty to two misdemeanors presents no conflict with Newman's testimony or with the prosecutor's jury argument that no agreement for a misdemeanor plea was reached (see Pet. Br. 55, n. 27). The prosecutors were not precluded from deciding, after trial, that Newman's cooperation warranted extending greater lenity to him than they had contracted to do; this belated decision, as the court of appeals held (see App. 123) did not retroactively falsify Newman's testimony or the prosecutor's argument concerning the terms of their agreement, as it stood at the time.

titled under the Jencks Act" impermissibly curtails his ability effectively to cross-examine government witnesses and thereby offends the Sixth Amendment right of confrontation (Br. 70). On its face, this argument appears to do little to further the inquiry whether the prosecutors' notes were producible.

Moreover, the cases relied upon by petitioner and *amici* hold only that, consonant with the Confrontation Clause, a defendant cannot be forbidden to undertake any relevant line of cross-examination. See *Alford* v. *United States*, 282 U.S. 687; *Smith* v. *Illinois*, 390 U.S. 129; *Davis* v. *Alaska*, 415 U.S. 308. But the right to unrestricted cross-examination does not carry with it a concurrent right to obtain material from government files not producible either under the Jencks Act or by virtue of the due process consideration recognized in *Brady*. There is no suggestion in the Confrontation Clause or cases interpreting it that a defendant may rummage in the government files or the prosecutor's notes in search of information that might have some utility on cross-examination.

The extent of Newman's cooperation with the prosecutors is in no way comparable to the juvenile probationer status of the witness in the *Davis* case, upon which petitioner primarily relies. The prosecutors' notes cannot fairly be characterized as evidence critical to establishing petitioner's contention that "the Government had its key witness in a truss" (Br. 57), and there is no foundation for *amici's* assertion (Am. Br. 23) that lack of access to the prosecutors' notes precluded petitioner from pursuing the extent of that

cooperation. Petitioner was not forbidden, as was the defendant in *Davis*, from asking questions on the subject. When Newman acknowledged on cross-examination that he had spent an average of five hours a day in the prosecutors' office since his initial appearance as a witness, it was open to petitioner to ask what Newman did during each of those five hour periods and to ask the jury to draw inferences from those meetings about Newman's cooperation with the government. Non-production of the prosecutors' notes was thus irrelevant to petitioner's ability effectively to utilize his right of cross-examination under the Confrontation Clause.

2. Petitioner's argument based upon the Compulsory Process Clause (Br. 66–68) is more elusive. If it is (see Br. 66–67) that a "denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right" (*United States* v. *Augenblick, supra,* 393 U.S. at 356), our answer is, as we have demonstrated, that the material involved in this case is not "a Jencks Act type of a statement."[48] If the argument is (Br. 67) that the failure of the prosecutor to disclose "exculpatory material statements of witnesses on the defendant's request" implicates "the Sixth Amendment's compulsory process guarantee" (citing *Johnson* v. *Johnson,* 375 F. Supp. 872, 875 (W.D. Mich.)), our answer is (see pp. 71–76, *supra*) that the material involved in this case does not

[48] *Augenblick* said merely that in some case (but not the case then before the Court) denial of production of a Jencks statement might constitute a violation of the Compulsory Process Clause.

consist of "exculpatory material statements" in the *Brady* sense.

Finally, Mr. Justice Brennan's concurring opinion in *Palermo,* upon which *amici* rely (Am. Br. 19), suggests no more than that the Compulsory Process Clause may be implicated when a statement not producible under the terms of the Jencks Act contains a direct conflict of fact with the witness's trial testimony. See 360 U.S. at 361–363. We believe it does not further the inquiry in such a situation to cast it in terms of the Jencks Act or the Compulsory Process Clause rather than to utilize the due process analysis of *Brady,* a case that post-dated *Palermo.* In any event, since petitioner has shown no such conflict between the notes and Newman's testimony, it follows that the Compulsory Process Clause is of no avail to him."[49]

[49] *Washington* v. *Texas*, 388 U.S. 14, upon which *amici* also rely (Am. Br. 20), involved a state statute that made the testimony of an accomplice "inadmissible whether he was present in the courtroom or not" (388 U.S. at 19). The Court found that such an "arbitrary rule," preventing "whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief," violated the Compulsory Process Clause (*id.* at 22). While *Washington* v. *Texas* thus obviously means that there is more to the Compulsory Process Clause than the right to secure the attendance of witnesses in court, it does not mean that a defendant has the right to inspect material in the prosecutor's file that is not otherwise producible.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,

Petitioner,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Contrary to the Government's assertions, the primary issue in this case is *not* "whether the Government trial attorneys' notes of conversations with a Government witness, prepared by the prosecutors to enable them adequately to present the Government's case before the jury, are the kind of witness' 'statements' contemplated

by the Jencks Act." (Resp. Br. at 19, 26)[1] Rather, the questions in this case on which this Court granted the writ of certiorari are three:

> 1. Does the Jencks Act contain an attorney's work product exception?
>
> 2. Are a Government attorney's notes of conversations with a key Government witness to whom the prosecutors read back their notes from time to time, where the witness corrected same, which notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached," compellable under the Jencks Act?
>
> 3. If the materials are not compellable under the Jencks Act, are they compellable under the doctrine of *Brady v. Maryland*?

The Government and petitioner agree that the Jencks Act does not contain a work product exception. (Resp. Br. 19, 27) That is all, however, upon which there is agreement. After this concession, and in response to issue number two *supra*, the Government contends that "generally an attorney's notes of witness' interviews will not be 'statements' within the meaning of the Jencks Act" (Resp. Br. at 19), and that the Jencks Act "problems can be avoided by defining the term 'statement' strictly where lawyers' notes are involved, as Congress intended."[2] (Resp. Br. at 21)

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[1]"Resp. Br." refers to Brief for the United States. "O. B." refers to Petitioner's Opening Brief. "Ap." refers to Appendix.

[2]Nothing cited in the Government's brief stands for the proposition that Government attorneys' notes were accorded or meant to be afforded a special and different standard, under the terms of the Jencks Act, from other agents of the Government.

I.

THE GOVERNMENT'S ARGUMENT THAT THE TERM "STATEMENT," AS DEFINED IN THE JENCKS ACT, HAS DIFFERENT MEANINGS FOR DIFFERENT PERSONS IS ERRONEOUS

The Jencks Act defines a statement of a witness, so far as is relevant to the issues in the case at bench, as "a written statement made by said witness and signed *or otherwise adopted or approved* by him." (18 U.S.C. §3500(e)(1), emphasis added) It is clear that Congress intended that nonverbatim summaries of a witness' words should be producible, if the witness had been given an opportunity to sign, verify, authenticate, or approve in some fashion what is contained in the summary (H.R. Rep. No. 700, 85th Cong., 1st Sess. 6 (1957)). The Government's proposed dichotomous definition of the term "statement"–based on whether attorneys or other agents of the Government record the witness' words–is without support in either the terms or the legislative history of the Jencks Act.

A. The Contention That Investigators And Attorneys Have Different Purposes Or Utilize Different Styles In Taking Notes Is Unsupported By The Record And Is Irrelevant To The Issues In This Case

In support of its proposed strict construction of "statements," the Government in effect proposes a redefinition of the term "statement" as used in the

Jencks Act. This redefinition is predicated upon several questionable premises, including the assumption that all lawyers invariably take notes the same way, and inevitably insert trial strategy, mental impressions and other material not part of a witness' "statement" when they take notes. (Resp. Br. at 16, 20-21, 29, 35 n.21, 37-38, 40-46) This assertion, which pervades the Government's brief, is both unsupported by the record and unsupportable as a matter of fact. Individual differences in style among attorneys, the importance of the witness, the scope of the expected testimony, the amount of time available for the interview, the availability of other recorded statements, and the purposes for which the notes are being taken, as well as various other factors, will influence the amount of detail in the notes and the degree to which they are verbatim. These differences are illustrated by the notes of the prosecutors in this case.[3]

Similarly, the fact that notes as to a witness' knowledge may be taken by a trained investigator does not exclude the possibility that the investigator's notes may include more than " 'raw' data." (Resp. Br. at 41 n.28) Investigators, like attorneys, take notes in different ways under different circumstances. The stage of the investigation, whether suspicion has focused on the witness, the amount of time available to the investigator, the circumstances under which the interview is conducted (time of day and location), and the amount of information available to the investigator at the time he makes his notes, each will affect the

[3]*See, e.g.*, notes of the two different prosecutors in this case—Lebowitz and Keilp—lodged by respondent.

quantity, detail, content, and manner of recording the witness' words. To argue that the attorney thus must take "very different kinds of notes" from those prepared by an investigator (Resp. Br. at 35 n.21) is a facile generalization. The Government's speculations, explanations, and conclusions as to how and why an investigator or attorney takes notes or records interviews lend nothing to the resolution of the issues before this Court. Petitioner submits that the idiosyncracies and proclivities of the notetaker, be he an agent or attorney, are endless. We do not think that is a matter for resolution before the Court and, in the context of the case at bench, the Government's conjecture is irrelevant.

B. The Issue Is Whether Newman Adopted Or Approved The Writings Of The Prosecutors

Another erroneous assumption by the Government is that the principal term to be defined is "statement," and a substantial portion of the Solicitor General's brief is devoted to the attempt to demonstrate that the notes an attorney makes are not statutory "statements" under 18 U.S.C. §3500(e)(1). (Resp. Br. at 27 *et seq.*) To this end, the Solicitor General quotes extensively from the legislative history of the Jencks Act. Congress was indeed concerned that a witness need not be attacked through a summary of a statement "which the witness has never seen and never approved and which was prepared by someone else." (H.R. Rep. No. 700, 85th Cong., 1st Sess. 6 (1957)) However, Congress did *not* require that the witness in all cases must write out the

statement himself, nor that the witness must affix his signature to the paper, to enable it to be his under the statute. *Campbell v. United States (II)*, 373 U.S. 487, 492 (1963). *See also United States v. Tomaiolo*, 280 F.2d 411, 413 (2d Cir. 1960). The critical definition, therefore, in the circumstances of this case is not of the term "statement," but rather of the phrase "adopted or approved."

The Congressional intent with respect to the meaning of adoption or approval is not precisely set forth. Nevertheless, the thrust of the provision was to insure that "[u]nless the witness has been in some way informed of the statements attributed to him and has indicated his approval of their accuracy, the summaries should not be turned over to the defense." (H.R. Rep. No. 700, 85th Cong., 1st Sess. 6 (1957)) In the context of the case at bench, it is clear that this concern has been met. *First*, "[t]hese entries were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached." (Resp. Br. at 18) *Second*, there was also reading back of their notes by the prosecutors, and correction of them by the witness Newman. (Ap. at 89-93) *Third*, these notes were taken in the context of interviews conducted pursuant to a plea bargain whereby the witness had agreed to waive his Fifth Amendment rights "and give to the United States a complete statement under oath concerning those events which are the subject for prosecution in [the petitioner's case]," expressly acknowledging that the pretrial statement under oath would be used against him (Newman) if he failed to testify in conformity with that statement at trial. (Ap. at 48-49) *Fourth*, these

notes were taken at interviews held in partial fulfillment of the agreement to render a complete statement, and represent deliberate waiver of the witness' Fifth Amendment rights at an off-the-record continuation of the prior partial, recorded interview. (Ap. at 52) It is clear, therefore, that both the witness Newman and the prosecutors had the utmost interest in preparation of an accurate record: Newman in insuring that his statements prior to trial were preserved properly to guarantee his anticipated benefits from cooperation with the Government; and the prosecutors in insuring that they had accurately set forth Newman's story, both to prepare themselves for trial and to bind Newman in case he entertained second thoughts about the context of his testimony at trial. Thus, in the context of this case, there can be no legitimate claim that disclosure of the prosecutors' recordation of Newman's words would unfairly prejudice Newman.

C. Congress' Concern Was Not With Protecting the Notetaker, But Rather The Witness, And The Work Product Doctrine Was Not A Concern Of Congress

The Government contends that Congress was expressly concerned that "Government trial attorneys' notes not be subject to routine inspection" and that, therefore, those notes which do not fit the precise template designed by the Government are not statements at all. (Resp. Br. at 29)

Petitioner has reviewed the legislative history of the Jencks Act cited by respondent (Resp. Br. at 49-51)

and found that with one exception[4] the only mention of attorneys' notes in the legislative history was in Senator Hruska's remarks (cited in Resp. Br. at 51) Senator Hruska's remark, in the context of the debate then occurring and on its face, indicates that the Senator's concern was "not . . . to have a witness impeached by material for which he himself was not responsible." Thus, the concern was not with the work product issue, as suggested by the Government, but rather with impeaching a witness who had no control over what was written and might be attributed to him. The focus of Congress was *not* on protecting the *prosecutor*, but on protecting the *witness*.[5] It is also

[4]The exception is the mention of the narcotics case in the Southern District of New York referred to in S. Rep. No. 981, 85th Cong., 1st Sess. 9 (1957) (Resp. Br. at 51), which is not sufficiently identified to permit a determination of what notes were requested, what foundation had been laid, or even if the notes related to the testimony of a Government witness. The Government also stresses the inclusion of the phrase, "made to an agent of the Government," as meaning "enforcement officials," and alleges that, "in common parlance," this excludes United States Attorneys. (Resp. Br. at 52 n.32) Petitioner is unaware where this "common parlance" originates; counsel, as a former Assistant United States Attorney, was under the distinct impression that the United States Attorney was the chief law enforcement official in each federal district.

[5]Petitioner has also noted that the quotation from Senator Javits' remarks (Resp. Br. at 52 n.32) is presented out of context. Senator Javits' observation, which was italicized by the Government, actually occurs in the course of a discussion between Senators Javits and Watkins as to *whether United States Marshals are "enforcement officials."* Lest Senator Javits' perception of the Congressional intent as to whether trial attorneys are covered by the disclosure provisions of the Jencks

significant that the statement of Attorney General Herbert Brownell, Jr., in support of the legislation (H.R. Rep. No. 700, 85th Cong., 1st Sess. 7-12 (1957)), listing in detail the dangers posed by expansive interpretation of the *Jencks* decision (*Jencks v. United States*, 353 U.S. 657 (1957)), did not mention disclosure of attorney preparation, but rather emphasized the danger unrestrained disclosure posed *to other investigations and cases.*

While the absence of express consideration of attorney work product by Congress is certainly subject to more than one interpretation, it does *not* manifest a congressional intent to exclude what might be both work product and a paragraph (e) statement from the scope of the disclosure provisions of the Jencks Act. The decisions cited by the Government, including *United States v. Nobles*, 422 U.S. 225 (1975), and *United States v. Aviles*, 337 F.2d 552 (2d Cir. 1964), are not to the contrary.[6]

Act be misunderstood, his remarks immediately following are worth quoting in full:

> "I am willing to say this to the Senator: I would be glad, for myself, to apply the provisions of this bill to all officials of the Federal Government. If the words do go that far, it is perfectly all right with me, and I know exactly what I am voting for. I think they do." 106 Cong. Rec. 15927 (1957) (remarks of Senator Javits).

[6]The authority of *United States v. Crosby*, 295 F.2d 928, 951 (2d Cir. 1961), cited by the Government as recognizing this Congressional intent, is doubtful in light of the later decision of *United States v. Aviles*, 315 F.2d 186, 191 (2d Cir. 1963), which adopted the extensive analysis of the relationship between the Jencks Act and the work product doctrine performed by Mr. Justice Reed in *Saunders v. United States*, 316 F.2d 346, 349-50 (D.C. Cir. 1963), who determined that there was no work product exception to the Act's disclosure requirements.

"If the [prosecutor's] notes contain both verbatim remarks of the witness and personal observations of the attorney, then paragraph (c) of the Act requires that the district judge inspect the statement and excise the protected material if this is possible. And if it is not clear from reading the notes whether or not they contain substantially a verbatim description of the witness' remarks, the court should conduct a hearing to resolve the matter." *Saunders v. United States*, 316 F.2d 346, 350 (D.C. Cir. 1963).

See United States v. McKeever, 271 F.2d 669, 674 (2d Cir. 1959).

D. The Risk That An Attorney Can Be Required To Testify In A Proceeding May Not Be Used As An Excuse For Denying The Production Of Relevant Material

The Government alleges that requiring production of an attorney's interview notes of a witness "creates an undue risk that attorneys will be required to testify." (Resp. Br. at 45) Petitioner suggests that an attorney always faces a possibility of having to testify any time a witness recants–be it on direct or cross–something which that witness previously stated to the attorney. However, that ever-attending possibility can not be used as an excuse to foreclose the "full disclosure of all the facts within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974).

Even under the restrictive definition of statements proposed by the Government (Resp. Br. at 53-54, 60), if the witness testifies inconsistently with the recordation the Government attorney made, the attorney may

still be called to the stand or requested to stipulate to the accuracy of his recordation. An examination of the statutory procedure for resolution of controversies regarding Jencks Act statements reveals that no real burden is placed on the Government.

After the defense has made an initial showing to the effect that the prosecutor did interview the witness and that the witness has "signed or otherwise adopted or approved" the prosecutor's recordation of the witness' story (18 USC § 3500(e) (1)), the defense must move for disclosure (paragraph (b)). If the Government claims that the materials do not constitute a statement, or that they contain extraneous material, the trial court *must* make an in camera inspection and take such additional evidence as is required to resolve the issue outside the presence of the jury.[7] The prosecutor may be called upon to explain to the trial judge the manner of creation of the statement, as may the witness, but this is done outside the hearing of the jury, and defense counsel is not permitted to see the statement unless and until the trial court has determined that the statement is compellable and has excised those portions which are not related to the witness' testimony. *See Palermo v. United States*, 360 U.S. 343, 354-55 (1959). Such procedure has been approved by this Court (*id.* at 354)

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[7] *Campbell v. United States (I)*, 365 U.S. 85, 92-96 (1961); *Palermo v. United States*, 360 U.S. 343, 354-55 (1959); *United States v. Chitwood*, 457 F.2d 676, 678 (6th Cir. 1972); *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963); *Ogden v. United States*, 303 F.2d 724, 733 (9th Cir. 1962); *United States v. Tomaiolo*, 280 F.2d 411, 413 (2d Cir. 1960).

and, as past cases indicate, imposes no extraordinary hardship on the prosecution.[8]

The "parade of horribles" which the Government seeks to trot out, citing Mr. Justice Jackson, concurring in *Hickman v. Taylor*, 329 U.S. 495, 517 (1947) (Resp. Br. at 47-48), in effect was rejected by this Court when it initially adopted the in camera inspection procedure. *See Palermo v. United States*, 360 U.S. at 354-55.

> "The function of prosecution and defense at the inquiry [is] not so much a function of their adversary positions in the trial proper, as it [is] a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination." *Campbell v. United States (I)*, 365 U.S. at 95.

Thus, the "bridge not crossed" in *United States v. Nobles, i.e.*, "whether the policies against putting in issue the credibility of the lawyer who will sum up to the jury outweigh the jury's interest in obtaining all relevant information" (422 U.S. at 253 (White, J., concurring)), is not even within walking distance in the case at bench. As pointed out by amici (Amici Brief at 33), the Government by its own doing chose to

[8]For example, in *United States v. Aviles*, 315 F.2d 186 (1963), at a hearing on the defendant's motion for a new trial, the Assistant United States Attorney testified as to the making of his notes, and the trial court initially ruled that some of the notes were producible as Jencks Act statements. 200 F. Supp. 711, 715-16 (S.D.N.Y. 1961). While the Court of Appeals affirmed the defendant's conviction–the trial court had applied an erroneous standard of law to the issue of production–the Second Circuit reproached the Government for not turning over the prosecutor's notes for in camera inspection during the trial. 315 F.2d at 192 n.3.

interview the chief witness outside the presence of either of its two postal inspectors. Further, the defense bar has long been laboring under the burden that it may well have to forego impeachment of a witness when the lawyer's testimony is the only available evidence to impeach that witness. In fact, this very situation occurred in the trial of this case, when both defense attorneys were prohibited from testifying as to events which flatly contradicted two Government witnesses' testimony. This rule was imposed by the trial court, even though one of the defense attorneys offered to withdraw from further representation of petitioner. (*See* Petition for Certiorari at 32-35, and citations to the record contained therein.)

II.

THE PROPOSAL OF THE GOVERNMENT TO DISPENSE WITH EVIDENTIARY HEARINGS AND IN CAMERA INSPECTION BY THE TRIAL COURT IS PREPOSTEROUS

Ultimately, the Government advances the proposition that when a prosecutor states to the court that notes are not statements of a witness, as defined in the Jencks Act, there is no need for an evidentiary hearing on the nature of the notes or for an in camera inspection by the trial judge to determine whether they are statements within the meaning of the statute. (Resp. Br. at 30, 60-61) Even in the abstract, this is a startling proposition, to say the least! If accepted by this Court, it would mean that the final arbiter of what constitutes that which should or should not be produced is not the

court, but the prosecutor—which would reduce the judiciary to a passive observer relegated to accepting whatever any prosecutor said to it at any time about any witness' "statements."[9] In the context of the case at bench, it is the height of insolence for the Government to contemplate, let alone advance such a notion, considering the chronology of events.

A. It Was Not Until After This Court Granted Certiorari That The Government Revealed For The First Time That Forty Pages Of The Notes Were Written By The Witness Newman

Not only has the Government not been consistent in its reasons for opposing production of these notes, but also it has been far less than candid in stating precisely what is encompassed within the 237-page packet of materials. Before the trial court, the Ninth Circuit, and this Court in the Government's opposition to the Petition for Certiorari, there was not a hint that the notes, or any portion thereof, were in fact authored by the witness himself, as opposed to the prosecutors. In fact, the Government's opposition to the certiorari alleged just the opposite. Not until after this Court granted the petition, and while petitioner was completing his opening brief, did this fact, *viz.* that 40 pages of the notes were written by Newman, himself, emerge

[9]Petitioner had assumed that this Court's prior decisions would have laid to rest such a contention on the part of the Government. *See Campbell v. United States (I),* 365 U.S. at 92-96; *Palermo v. United States,* 360 U.S. at 354-55; *cf. United States v. Nixon,* 418 U.S. 683, 703-05 (1974).

from the woodwork. This concealment by Government attorneys demonstrates more forcefully than anything petitioner can say why there must be an absolute requirement that the trial court conduct an in camera inspection.

The chronology of events is depicted by the following summary:

CHRONOLOGY OF VARIOUS DESCRIPTIONS GIVEN TO "NOTES" CONCERNING NEWMAN CONVERSATIONS

	DATE	PLACE	CHARACTERIZATION BY:	NOTES EXAMINED BY COURT	CHARACTERIZATION AND REASONS FOR NON-PRODUCTION	LOCATION OF NOTES WHEN CHARACTERIZATION MADE
1.	6/27/73	Trial Court	Trial judge [none by prosecutor]	No	"Attorney's work product, notes of interviews with witnesses." (Ap. 94)	Asst. U.S. Attorney
2.	6/28/73	Trial Court	Trial judge [none by prosecutor]	No	"These are notes made by a trial attorney in preparation for trial . . ." (Ap. 97)	Asst. U.S. Attorney
3.	7/2/73	Trial Court	Prosecutor	No	". . . merely our notes which reflect substances of conversations, our impressions, certain entries . . . classified as trial strategy. They were not taken down verbatim. They were not shown to the people that we were interviewing. Nobody was asked to sign them in the form of a signed statement, and we feel that it (sic) is properly the work product of counsel and we would stand on that." (Ap. 98)	Asst. U.S. Attorney
4.	6/28/74	Ninth Circuit	Prosecutor	No	Abandons work product privilege, contends notes do not constitute statement under 18 USC 3500(e). ". . . entries were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached. They were not written to preserve testimony, nor do they ever reflect the complex degree of conversation which preceded their recordation . . . (Appellee's brief, Cir. Ct., p. 64)	Government wrongly contended to Circuit that notes were part of trial record (pp. 64, 67, Appellee's Brief.)
5.	8/12/74	Ninth Circuit	--	Lodged	--	Govt. admitted notes not in trial record; now lodging all notes could then find
6.	12/18/74	Ninth Circuit	Ninth Circuit	?	Notes "were not statement of *defendant* within the meaning of 3500(e)" (Ap. 120)	--
7.	5/30/75	Supreme Court	Solicitor General		"[P]rosecutor's handwritten notes . . . included the prosecutor's impressions, points of trial strategy, and explanations by witness of items of physical evidence concerning which he himself did *not* testify. . . . [T]he notes did not comprise a 'statement' within the meaning of the Jencks Act." (Govt.'s opposition to petition for certiorari, p. 4)	Ninth Circuit
8.	11/75	Supreme Court	Solicitor General		For the first time, Gov't admits that 40 pages of notes are actually in Newman's handwriting. Additionally, Gov't lists 17 pages written by Asst. U.S. Attorney Keilp, and 170 pages written by Asst. U.S. Attorney Lebowitz (Gov't. Br., pp. 15-17)	Supreme Court

The Government, in describing the 237 pages of notes, states that they have "been forwarded to this Court because their examination may aid a proper resolution of this case, *as it did in the court below*." (Resp. Br. at 15, emphasis added) Thus, the Government seeks to leave this Court with the impression that the Ninth Circuit was privy to an understanding of what these notes were, who prepared them, their contents, and what they represented. If this Court has that impression, it is indeed a mistaken one.

In the first place, the Government was never consistent with their description of what precisely constituted the notes. Not even a murmur was emitted by the Government in either of the courts below by way of explanation or clarification concerning these 237 pages. The affidavit of Assistant United States Attorney Lebowitz dated August 27, 1975 (which petitioner is informed has been lodged with this Court), contends only that he "advised the [Circuit] Court that these were all the notes."[10]

[10]Petitioner disputes the fact that these were the words used and states, in the affidavit of his counsel filed herewith as Exhibit "A", that what the prosecutor actually said to the Panel on August 12, 1974, was that "these are all the notes I could now find." As noted by petitioner (O.B. at 23), up until the time of oral argument before the Circuit Court, the Assistant United States Attorney handling this case had been claiming that the notes were part of the sealed record–a claim which was then refuted by the record and ultimately so acknowledged when the prosecutor resorted to unilaterally supplementing the record by lodging "all the notes [he] could now find" on August 12, 1974. (See Affidavit of petitioner's counsel, attached as Exhibit "A" hereto.)

The sudden appearance at oral argument of 237 pieces of paper with handwritten notations, without any legend as to who wrote what, let alone when it was written or under what circumstances, obviously confused the Court of Appeals. Accordingly, it characterized these very notes as "not statements of the defendant" (Ap. at 120), a contention never made by petitioner or even the Government.

B. An Analysis Of The Notes Reveals Detailed Recordation Of Information Received From Newman

The Government's brief contains a section entitled "The Nature of the Notes" (Resp. Br. at 18), wherein they purport to explain the contents of the notes, who authored them, and their purpose.[11] The pagination of the 237 pages of those notes lodged with this Court follows no format; and the 40 pages of Newman's writings are interspersed with the handwritten notes of Lebowitz, which are in turn interspersed with those written by Keilp.[12] While the Government characterizes these notes as containing jottings, to someone familiar

[11]Of course, there is no citation to the record below to support these averments since the notes were never before the trial court, nor was any explanation of these notes before the Ninth Circuit. Further, the organizational pagination of the notes makes it very difficult for any meaningful review of these notes to be undertaken by any person not intimately familiar with the record below.

[12]The Government attributes the authorship of these notes as follows: Newman: pp. 18-19, 126, 147, 208, 224-238. Lebowitz: pp. 2-17, 20-40, 43-97, 102-125, 148-186, 191-198, 207, 209-210, 213-215, 217-223. Keilp: pp. 41-42, 187-190, 199-206, 211-212, 216.

with the testimony of the witnesses and issues of the case, those jottings are neither puzzling nor cryptic.[13]

The Government argues that some of these notes were the prosecutors' notes for cross-examination. Assuming *arguendo* that a prosecutor's own notes in preparing for cross-examination are not compellable under the Jencks Act, the remaining 116 pages of notes not concerned with cross-examination reflect the following categories of information related to the Government attorneys by Newman:[14]

1. Pages on which direct quotations of conversations appear: 63, 156, 157, 170, 177, 186.

2. Pages on which conversations between Newman and petitioner, and/or events between petitioner and annuitants or lenders, are stated to have occurred: 10, 14, 20, 23, 25, 31, 32, 35, 36,39,41, 45, 46, 47,49, 50, 51, 52, 57-60, 62, 151-153, 156, 158-161, 164, 169, 170, 171, 172-176, 211, 218- 220, 222, 223.

3. Pages on which conversations or events between Newman and another are stated to have occurred: 31, 33, 35-37, 45-48, 50-52, 56, 159, 160, 167-170, 173, 176, 212, 213-215, 216, 221.

[13]Petitioner is somewhat hampered in examining the notes lodged by the Solicitor General because portions of the pages furnished are illegible, particularly the lower righthand corners and in the lefthand margins of the following pages: 9, 10, 11, 12, 14, 15, 16, 20, 28, 30, 32, 35, 36, 37, 38, 50, 77, 78, 81, 83, 86, 87, 88, 91, 95, 97, 103, 104, 108, 109, 118, 121, 124, 135, 136, 140, 141, 156 and 214.

[14]Of the 237 pages of notes lodged with this Court, the prosecutors prepared a total of 193 pages. 77 pages appear to reflect questions written for use in cross-examination. The excluded pages are: Mr. Lebowitz—pp. 64-125 (cross-examination of petitioner); 191-195 and 198 (cross-examination of Schwartz); 209, 210 and 217 (cross-examination of Paradine). Mr. Keilp—pp. 187-190 (cross-examination of Schwartz).

4. Pages on which conversations or occurrences between Newman and one of FSL's attorneys are alleged to have occurred: 14-16, 18, 20, 30, 41,47, 53, 55, 177, 178, 179, 181, 182, 183, 186, 196, 218, 219, 221.

5. Pages which reflect events observed or participated in by Newman which were alleged in indictment: 17, 20, 41,45-47, 50, 51, 53, 54, 63, 151, 170, 172-175, 177, 178, 186, 196, 213, 214, 220, 221.

6. Pages which reflect the involvement of other attorneys in the operation of FSL: 13, 15, 21, 34, 148, 159, 177.

7. Pages which reflect matters concerning petitioner's utilization of annuities: 62, 63, 150, 151, 153, 156, 164-166,197.

8. Pages which reflect events concerning examination of FSL by the Arizona Insurance Commission: 61, 205, 206, 218, 219, 221-223.

While it is true that on many of the pages noted in these categories there are doodlings and jottings and marginal notations, that does not mean that the information provided by Newman, *i.e.*, dates, times, places, conversations, and who did what, when, does not appear—for it does. Furthermore, on those pages noted in the eight categories above, there are few, if any, entries that can truly be referred to as trial strategy.

Additionally, there are 40 pages of notes in Newman's own handwriting which even the Government must admit constitute statements of the witness within the meaning of the Jencks Act. As to 13 pages of these notes (pp. 126-129 and 131-138), the Government argues that these are questions prepared by Newman

concerning examination of petitioner, and thus could not be used to develop inconsistencies in Newman's testimony from the witness stand. (Resp. Br. at 68-69) Petitioner disputes that notion, and the questions appearing at these pages in fact are written in such a fashion as to give Newman's version of the events to which they are addressed. All of Newman's notes were a writing in his own hand and relate to events involved in petitioner's prosecution. It is sophistry to suggest that questions of the sort here do not constitute a statement within the meaning of the Jencks Act merely because they are not written in narrative form.

In reviewing these notes—the prosecutors' as well as Newman's—it must be remembered that the witness Newman, according to the Government at the appellate level at least, was involved intimately in the prosecution of the Government's case against petitioner. (Resp. Br. at 17-18) Indeed, at one point the Government characterizes his participation as rendering "legal advice . . . to the prosecutors." (Resp. Br. at 17 n.12) Newman's involvement with the prosecutors and the fact that he spent well in excess of 40 hours assisting the Government, as established in the record below, plus the fact that the prosecutors when taking notes sometimes read back to him his answers, and he would correct them, preclude the Government's assertion that the notes were not "adopted or approved" by him. As stated by the prosecutor to the Ninth Circuit, and as reiterated by the Solicitor General in his brief to this Court, "these entries were often prepared only after lengthy conversations had occurred and a *mutual understanding* of the factual situation had been reached." (Resp. Br. at 18) The argument that the

notes were not adopted or approved by the witness is belied by the record.

Further, the Government overlooks the fact that Newman and his credibility were the key to the prosecution's case. If the notes had been made available to petitioner, he would have been able to explore to greater depth the areas only superficially touched upon by the prosecutors when questioning Newman on direct examination, and petitioner could have conducted a far more searching inquiry on cross-examination, not only concerning Newman's testimony on direct, but also concerning the true extent of Newman's involvement with the prosecutors.

III.

THE FAILURE OF THE TRIAL COURT TO COMPLY WITH THE EXPRESS REQUIREMENTS OF THE JENCKS ACT WAS PREJUDICIAL ERROR REQUIRING A NEW TRIAL

The Government argues that its failure to produce the notes to the trial court at most could be harmless error (Resp. Br. at 67) and that, even if remand were ordered, the remand in all probability would result in the District Court's concluding that the error was harmless. Such a course would permit the Government to ignore the plain requirements of the Jencks Act and sit back and hope that, if it is later uncovered, the Government will have the opportunity to convince some appellate court that at most its violation was only harmless error. The production of the notes—be they

written by the prosecutor or by the witness Newman—and their utilization by the defense are not questions for unilateral resolution by the Government. *Bary v. United States*, 292 F.2d 53, 58 (10th Cir. 1961) And it is not for the courts, especially the appellate courts, to look at a cold record and speculate whether these statements could have been used effectively. *Clancy v. United States*, 365 U.S. 312, 316 (1961).

In *United States v. Tomaiolo*, 280 F.2d 411 (2d Cir. 1960), the Second Circuit followed this Court's holding in *Palermo* in amplifying the need for full disclosure as a component of fair trial. In *Tomaiolo*, the court was faced with an appeal from the third robbery trial of the defendant. Despite overwhelming evidence of guilt, the Government's failure to turn over one particular Jencks statement directed the court's action in reversing the conviction. The court reasoned:

> "Since the defendant has already been tried three times, it is unfortunate that we feel compelled to reverse and to order yet a fourth trial. And it is perhaps doubly unfortunate that this must occur because of the reluctance of the prosecutor and the trial court to accept the policy of yielding pre-trial statements of prosecution witnesses to the defense for purposes of cross-examination as defined in [*Jencks v. United States* and the Jencks Act]. Here the statement refused the defense was that of the key witness for the prosecution . . . and we think reversal compelled under *Palermo v. United States*, 360 U.S. 343, 79 S. Ct. 1217, 3 L.Ed.2d 1287, and our own decision in *United States v. McKeever*, 2 Cir., 271 F.2d 669." 280 F.2d at 412.[15]

[15]The facts of *Tomaiolo* are similar to those in the instant case to the extent that the statement was of the key prosecution witness who was an unprosecuted accomplice of defendant, and who had made several statements to the F.B.I. One of the statements was turned over to the defendant, but the other was not because it had not been signed by the witness, and had been prepared by one of the interviewing agents. The unsigned statement, however, had been read and reviewed by the witness, who had made corrections, insertions, and other initialed changes 22 times in the document. 280 F.2d at 413. The unsigned statement contained information contradictory to the one turned over to the defendant, *i.e.*, that the witness did not recall seeing the defendant present at a critical point in the commission of the offense.

Judge Learned Hand, in reversing a defendant's criminal conviction because of the Government's refusal to allow defense use of a document thought privileged from disclosure, stated: "We cannot of course know . . . how prejudicial the exclusion may have been, but that uncertainty alone requires a new trial. . . ." *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944). *See United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969) ("Unless it is perfectly clear that the defense was not prejudiced by the [failure to comply with the Jencks Act], reversal is indicated."); *accord, United States v. Cleveland (I)*, 477 F.2d 310, 316 n.9 (7th Cir. 1973); *United States v. Aaron*, 457 F.2d 865, 869 (2d Cir. 1972).

That this is a logical position in light of an appellate court's responsibility *not* to draw conclusions from the use or effect of heretofore absent evidence at trial was recognized by this Court in *Clancy v. United States*, 365 U.S. at 316,[16] when it stated that:

[16]*Clancy* involved memoranda made by F.B.I. agents who testified at trial, which were prepared after interviewing the defendants. Those memoranda related to the trial testimony of the agents. Likewise, in the present case, the notes *written by Newman* related to his trial testimony, and were prepared during meetings with the prosecutors. The Government's assertion that *Clancy* is inapposite to the instant case (Resp. Br. at 54-55 n.35) is plainly wrong as to the notes written by Newman, since he testified at trial. This assertion can only be in reference to the notes taken by the prosecutors.

"Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

IV.

THE FAILURE OF THE GOVERNMENT TO PRODUCE AND IDENTIFY NEWMAN'S HANDWRITTEN NOTES SHOULD BE CONSIDERED PLAIN ERROR, AND REQUIRES REVERSAL

The United States has now conceded that certain notes contained in its files are the handwritten notes of Newman, only "now" discovered in the preparation of its brief. These notes clearly fall within the production mandates of the Jencks Act under paragraph (e)(1), even under the restrictive interpretation urged by the Government for attorneys' notes. (Resp. Br. at 60)

> "[I]f the witness writes out a narrative statement of certain events in his own handwriting, such a statement would constitute a written statement made by said witness and signed or otherwise adopted or approved by him within the meaning of 18 U.S.C. 3500(e)(1).... [S]even pages of the notes handwritten by Newman in this case appear to be precisely that kind of statement." (Resp. Br. at 28)

The seven page narrative relating to the activities of Paradine (pages 232-38 of the notes), as well as the remaining 33 pages in Newman's handwriting (Section II-B, p. 13 *supra*), are unquestionably the type of statements the disclosure of which is required by the

Jencks Act. Nevertheless, the Government asserts that the required production of this statement was "waived" because of the failure to make a Jencks Act request for disclosure of the material after Newman testified on redirect examination. (Resp. Br. at 67)

The Government's waiver argument does not hold water. *First*, this argument ignores the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). Irrespective of the merits of the argument that failure to renew the Jencks Act motion constitutes waiver, the effect of the *Brady* motion is not dissipated by time. Here the petitioner moved for production under the *Brady* doctrine both during cross-examination of Newman (Ap. 53-56, 98-99) and at the close of the Government's case (Ap. 99-100).

> "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though ... his action is not 'the result of guile'...." *Brady v. Maryland*, 373 U.S. at 87-88.

Both the facts of the case at bench, and the nature of the material withheld, bring it squarely under the rule of *Giglio v. United States*, 405 U.S. 150 (1972). Issues of the consistency of this narrative with other testimony aside, the very fact, for example, Newman wrote out narratives of the witness Paradine's involvement with petitioner by itself is material to the issue of Newman's credibility, for it reveals the extent of his alliance with the prosecution in a manner not replicable simply by cross-examination as to the content of a plea bargain. *See id.* at 153-55.

Second, during direct examination of Newman[17] petitioner questioned both Newman and the prosecutors as to whether Newman had turned over any documents, books, records or papers to the Government. Both Newman and the prosecutor made affirmative representations that no such transfer of materials had occurred, with certain limited exceptions not relevant here. Whether or not the Newman materials were in existence at that time,[18] their creation and delivery to the prosecutors made these affirmative representations no longer correct. Thus, if the Newman writings were in existence when the prosecutors denied they had received any items from him, there is a clear violation of the doctrine of *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), through the deliberate deception of the trial court. If the Newman materials were developed later, the failure to correct a record that was then no longer accurate was a violation of the principles underlying *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In either case, "suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' " *Giglio v. United States*,

---

[17]*See* Reporter's Transcript of trial, pages K60-63, a copy of which are attached hereto as Exhibit "B".

[18]The prosecution was in the best position to know when the notes were created and to conclusively establish that fact by lodging the notes with the trial court for preservation in the record. By lodging these in the Ninth Circuit as the notes which were the subject of the Jencks Act and *Brady* demand by the defense during the cross-examination of Newman (Ap. 53-56, 98-99), the Government should be considered to be foreclosed from now contending that the notes were not in existence at that time (Resp. Br. at 67, 71).

405 U.S. at 154, *quoting Brady v. Maryland*, 373 U.S. at 87.

Third, the waiver doctrine advanced by the Government (Resp. Br. at 67) on the basis of petitioner's failure to renew the Jencks Act motion after Newman had testified in rebuttal is based on scant authority and dubious logic. The sole case cited by the Solicitor General in support of this proposition, *United States v. Wisener*, 494 F.2d 516 (5th Cir. 1974), must rest on the fact that there was no showing of any kind of the existence of possible statements requiring in camera inspection by the trial judge, and there was not even a request for such an inspection by defense counsel. The most cursory examination of that case demonstrates that it bears no factual resemblance to the case at bench. Furthermore, the *Wisener* case regarded as standing for the existence of a waiver doctrine, which a close reading of the case renders doubtful, the circumstances of this case render such a doctrine inapplicable.

The prosecutors made affirmative representations that they possessed no notes that were not attorney work product. (Ap. 98) Under no stretch of the imagination can Newman's writings be considered part of the prosecutor's work product. *Cf. Hickman v. Taylor*, 329 U.S. 495 (1947); *Fed. R. Civ. P.* 26(b)(3). *See also United States v. Nobles*, 422 U.S. at 236-40. The trial court's final ruling denying production of the notes was based in part upon the representations of the prosecutors regarding the notes. (Ap. 98-99) Given the trial judge's hostility to petitioner's Jencks Act motion as manifested on three separate occasions (Ap. 94, 97, 99), and the affirmative representations of the prosecu-

tors that they possessed only "work product," it would have been nothing short of a waste of breath for petitioner to have renewed his motion at the close of Newman's direct examination in rebuttal. The ancient maxim, *"lex neminem cogit ad vana seu inutilia peragenda"* (the law compels no one to do vain or useless things), clearly is appropriate in this context. Since "only the government knows the content of its own files" (*Ogden v. United States*, 303 F.2d 724, 733 (9th Cir. 1962)), to hold that there was a waiver of the right to producible statements in the context of this case is to retreat to a "game of verbal jackstraws" where the defense would have to comply with "the niceties of ancient common law pleading in the formulation of demands for producible statements." *United States v. Aviles*, 315 F.2d 186, 190-91 (2d Cir. 1963) Such a requirement would be inconsistent with both the terms of the Jencks Act and the prior decisions of this Court.

Nevertheless, the Government asserts that the limited grant of certiorari in the present case forecloses consideration of these notes. (Resp. Br. at 78)[19] Not only does this assertion underscore the fallacy of a

[19]The Government's assertion is made with the almost apologetic explanation that petitioner had no way of knowing the existence of these notes at the time the petition for certiorari was filed, as the author of the Government's response "first became aware that some of the notes were written by Newman himself during the preparation of the brief in this Court." (Resp. Br. at 66) It is especially curious that perusal of the notes only at this stage in the proceedings engendered discovery of their authorship. The Government necessarily had to closely view the notes when it searched its materials so as to produce the notes for "lodging" before the Ninth Circuit.

frightening Government contention[20] but it also ignores the historical power of this Court to deviate from the grant of certiorari in order to notice plain error. Additionally, in light of the circumstances involved in this action, such a purported disposal of the question fails to account for the *Brady* implications attendant to suppression of producible materials—a subject expressly before this Court under the grant of certiorari. The Government cannot now be permitted to sweep under the rug, because of petitioner's failure to raise the question on his Petition for Certiorari, the issue of production of Newman's own writings. After all, the existence and authorship of those writings was denied by the Government until after this Court granted the petition.

A. The Doctrine Of "Plain Error" Enables This Court To Consider Errors Of Grave Dimension Which Fall Without The Grant of Certiorari

Under Rule 52(b) of the Federal Rules of Criminal Procedure and Rule 40(1)(d)(2) of the Revised Rules of the Supreme Court of the United States, this Court has "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood, C.J. v. United States*, 330 U.S. 395, 412 (1947). As explained in *Silber v. United States*, 370 U.S. 717 (1962):

[20]"There is no more reason to require a trial court to look behind the prosecutor's representation that there is no undisclosed *Brady* material in his file than there is to look behind the prosecutor's representation that he has produced all of the prior statements of witnesses in the Government's possession." (Resp. Br. at 76)

> "While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception . . . 'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' (Citation)" *Id.* at 717-18.

In appropriate circumstances, such noticed error may be sufficiently egregious in and of itself to justify reversal *sans* consideration of the questions delimited in the grant of certiorari. *See Rogers v. United States* __U.S.__, 45 L.Ed.2d 1, 7 (1975) (discovery after certiorari granted that defendant had not been present at all trial proceedings held independently sufficient for reversal). It is submitted that the posture of the present case, where suppression of clearly producible materials has occurred, requires this result.

B. The Facts In This Case Establish Violations Of Both The Jencks Act And The Doctrine Of *Brady v. Maryland*.

The Government conveniently seeks to lump the notes made by the Assistant United States Attorneys and those written by Newman into one category when responding to petitioner's *Brady* argument. (*See* Resp. Br. at 72 *et seq.*) Thereafter, broadstroke generalities are stated relating to "the prosecutors' notes" and the interplay with the disclosure requirements enunciated in *Brady* and its progeny, all the while neglecting to

extend such interplay to Newman's own statements. This, of course, is understandable because the Government does not want to be forced to admit that in its failure to turn over the conceded Jencks material, *viz.* Newman's own notes, it has engendered a *Brady* violation, independent of any argument that the United States Attorneys' own notes were compellable under *Brady*.

The premise from which the Government proceeds in attempting to distinguish Jencks Act from *Brady* considerations is that:

> (1) The Jencks Act is concerned with prior witness statements directed toward cross-examination and impeachment of that witness at trial;
>
> (2) *Brady*, based on due process concepts, is concerned only with disclosure of material containing exculpatory *facts*, and thus a defendant has no right under *Brady* to materials not containing such exculpatory facts. (Resp. Br. at 74, emphasis in original)

This premise, however, is erroneous in that it unnecessarily limits *Brady* to exculpatory facts, while refusing to acknowledge that impeachment material is one type of material favorable to the defendant envisioned by *Brady*. This Court in *Giglio v. United States*, 405 U.S. at 154, stated:

> "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." (*quoting Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

Second, irrespective of whether material producible under the Jencks Act in the abstract may be considered

exculpatory in a *Brady* sense, the defendant has been deprived of the opportunity to *utilize* it in an *exculpatory manner* when it has been withheld from him. It is from the deprivation of this opportunity that the entire panoply of Fifth and Sixth Amendment rights are brought into play.[21]

There can be no argument with the Government's assertion that *Brady's* concern is with "practices rightly deemed so fundamentally unfair as to deprive a criminal defendant of due process of law." (Resp. Br. at 74) But what is more fundamentally unfair than failure to supply the defendant with material recognized to be a chief weapon in the defense arsenal? To state the question is to answer it. In the instant case, the deprivation of the full ability to portray Newman properly before the jury was " 'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " *Davis v. Alaska*, 415 U.S. 308, 318 (1974)[22] The grievousness of this error is such as to preclude application of the harmless error rule.

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[21]As an extension of the due process rationale of *Brady*, this Court may also consider a third fault in the premise: it does not address the situation at bench where the prosecutor repeatedly misrepresented at both trial and appellate levels that all the notes were work product of the Government attorneys, and then later admits its "error" in so representing. Certainly, such "guileless suppression," if it truly be such, expressly falls within the parameters of prior decisions indicating that prosecutorial deception of both the court and defendant is a serious affront to the due process clause.

[22]The Government strenuously argues that Newman testified *consistently* with his previous statements, rather than inconsistently, so petitioner cannot validly claim lost impeachment value from his failure to receive and utilize the statements. (*See, e.g.*, Resp. Br. at 69, 70 n.41) If petitioner were concerned only with impeachment by inconsistent statements, this might be true. However, petitioner submits that the notes were valuable since they demonstrated Newman's bias and interest in securing petitioner's conviction. The Government represented that the plea bargain with Newman was that he would plea to a felony count. Newman denied that the bargain was other than that, but after petitioner's conviction Newman in fact pleaded not to a felony, but two misdemeanors. (*See* Petitioner's O.B. at 55-56) Petitioner argued this to the jury, but was handicapped by not knowing the full extent of Newman's participation in the prosecution. The numerous and detailed statements prepared by Newman to aid the prosecutors in their presentation of the case against petitioner, had they been disclosed, would have significantly supported petitioner's claim that Newman had a very real interest in securing petitioner's conviction.

CONCLUSION

The decision of the court below should be reversed and petitioner granted a new trial for the reasons set forth in Petitioner's Opening Brief and in this Reply Brief.

DATED: December 29, 1975, at Los Angeles, California.

Respectfully submitted,

/s/Donald C. Smaltz
DONALD C. SMALTZ
Attorney for Petitioner,
Philip J. Goldberg

APPENDIX A

SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 74-6293

PHILIP J. GOLDBERG,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT OF DONALD C. SMALTZ

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, DONALD C. SMALTZ, being first duly sworn, depose and say:

1. I am an attorney at law, admitted to practice before the United States Supreme Court and in the States of California and Pennsylvania. I was formerly an Assistant United States Attorney and Special Assistant to the United States Attorney.

2. I represented the petitioner, Philip J. Goldberg, in the trial of this action. I also represented him in the proceedings before the Ninth Circuit Court of Appeals.

3. I have received and read a copy of an Affidavit of Ronald A. Lebowitz dated August 27, 1975, wherein

he represents, *inter alia*, that at the time of oral argument before the Ninth Circuit Court of Appeals he "submitted . . . the totality of these notes taken during conversations between the Government and Edwin Newman . . ." and that Mr. Lebowitz "advised the court that these were all the notes."

4. My recollection is different from that of Mr. Lebowitz concerning what he said about the "notes."

5. I was present at the Court of Appeals on August 12, 1974, the date oral argument was scheduled before the Ninth Circuit. When the case was called on the morning of August 12, I agreed to waive argument if the Panel would agree to read and consider appellant's reply brief which had been lodged, but not filed. I explained to the Panel that said reply brief had been due July 22, 1974; because I was out of the country when the Government's brief was received on July 1, 1974, I requested (on July 8) a 10-day extension until August 1, 1974, to file appellant's reply brief; that on July 31, 1974, the day before said reply brief was due, the senior judge on the Panel, Honorable M. Oliver Koelsch, issued a telephonic order stating that I could only file the brief on the due date, August 1, if it were no more than 10 pages in length; that at the time my office received the call on July 31, the reply brief had been written and was in the final typing stages, and there was no way to reduce it to 10 pages in one day; that the reply brief was completed and lodged with the court, but Judge Koelsch had refused to permit it to be filed.

6. After a brief bench conference between the three judges, they indicated they would read and consider that reply brief if I waived oral argument.

7. Mr. Lebowitz then addressed the court and said that, with regard to the third issue in appellant's brief, the Jencks Act matter, he had believed the attorneys' notes had been made a part of the record; that he was now requesting permission to lodge all notes made by Assistant U.S. Attorney Keilp and himself that he could now locate. At that time, Judge Koelsch stated from the bench that the court would permit the notes to be lodged, and the Court adjourned.

8. In August, 1975, I had various telephonic conversations with the Clerk's office for the Ninth Circuit, during which I spoke with Deputy Clerk Ray Hewitt. Mr. Hewitt informed me that there was no tape recording or other record kept concerning what was said by the attorneys in the court on August 12, 1974.

9. The notation on the facing page of the notes to the effect that they were lodged on July 12, 1974, is incorrect and should read August 12, 1974.

/s/Donald C. Smaltz
Donald C. Smaltz

Subscribed and sworn to before me
this 29th day of December, 1975.

/s/Lois Robinson
Notary Public

EXHIBIT "B"

THE COURT: Okay.

Ladies and Gentlemen, we will take our morning recess. You may be excused until the Clerk calls you back.

(Jury withdraws from the courtroom.)

MR. SMALTZ: Your Honor, I'd like to make a motion, if I may, before you leave the bench.

THE COURT: Go ahead.

MR. SMALTZ: Mr. Newman, have you turned over any documents, books, records or papers to the U.S. Government?

THE COURT: Like when?

MR. SMALTZ: Any time before he commenced his testimony this morning?

THE WITNESS: No, sir. All my work and documents has been on documents that were given to me through discovery earlier in the proceedings.

MR. SMALTZ: In other words, the only–

THE COURT: These are Government documents?

THE WITNESS: That's right.

MR. SMALTZ: You don't have any of your own personal records or anything else that you've used in refreshing your recollection or turned over to the Government?

THE WITNESS: No, I have no records.

MR. SMALTZ: No copies of any files whatsoever?

THE WITNESS: No, not that I recollect.

MR. SMALTZ: I will ask Government counsel, has Mr. Newman turned over anything to you in the form of documents, papers, books, records, et cetera?

I'll direct the question to Mr. Marshall.

THE COURT: I think Mr. Marshall is getting the question now.

MR. LEBOWITZ: Well, now, I will say one thing that Mr. Newman did turn over to us and that was an exhibit that was read out to the jury last Friday which was a memorandum and he also turned over another letter which I believe is dated sometime in May of 1969, copies of–

THE COURT: Are these documents that have been given to counsel?

MR. LEBOWITZ: Oh, yes. They were given to counsel prior to the beginning of this trial.

THE COURT: Satisfied, Mr. Smaltz?

MR. SMALTZ: Is that all?

THE WITNESS: Yes, sir.

MR. LEBOWITZ: That's the only thing that I've received.

THE WITNESS: I'm sorry that I didn't recall those two. I thought you meant documents relating to the transaction.

MR. SMALTZ: That's all.

MR. LEBOWITZ: One other thing I'd like to put on the record at this time, if I may.

Your Honor, as the Court is aware and Mr. Smaltz is quite correct, the agreement was written and it was filed and it was held under seal, that I'd like to make the statement at this time that the entirety of the agreement was not testified to in the presence of the jury.

The reason for this is that Point 2 of this agreement, if it was brought out in the Government's case in chief on direct evidence, could be construed upon an improper commentary on the defendant's insistence or

assertion of his right to go to trial. And Section 2 of this particular agreement states that in the event that the defendant were to enter a guilty plea, that Mr. Newman–

THE COURT: Well, Mr. Smaltz has a copy of it. He can use it.

MR. SMALTZ: No, I don't, not yet.

THE COURT: Well, he is giving it to you now.

MR. LEBOWITZ: Mr. Smaltz is getting a copy of it now and I'd just like to state we have no intention of bringing this out on direct evidence and if Mr. Smaltz wants to bring it out on cross, I cannot control that.

THE COURT: That's a matter for the discretion of the defendant and his counsel.

Okay. We will stand at recess for awhile.

No. 74-6293

Supreme Court, U.S.
FILED
AUG 26 1974

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND FEDERAL DEFENDERS OF SAN DIEGO, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

California Attorneys for Criminal Justice (CACJ) is a California Organization of California private attorneys, public defenders, and interested law students whose objective is the furtherance of criminal justice.

Federal Defenders of San Diego, Inc., is a private non-profit corporation established to secure competent representation for indigent defendants.

Both organizations are dedicated to the improvement of the administration of justice, the preservation of the rights of individuals, and fairness in criminal prosecutions where life and liberty are at stake.

Amici are extremely concerned over the outcome of the case at bar because of their common desire to have fundamental constitutional rights of criminal defendants protected. Amici are dedicated to giving meaning to the Sixth Amendment right to the effective assistance of counsel. A system of justice founded on the adversary system requires full presentation of the issues in a criminal case by competent counsel on both sides. Amici believe the decision of the Ninth Circuit Court of Appeals was contrary to the goal of full disclosure. If that judgment is upheld it would have disastrous and destructive impact on the Fifth and Sixth Amendment rights of the criminally accused.

Amici fully agree with the position of the

petitioner that the order of the trial court at issue here was improper and that the decision of the Court of Appeals was erroneous. This brief is submitted in support of petitioner's arguments.

SUMMARY OF ARGUMENT

The prosecutors' notes of forty hours of conversation with the key government witness constitute statements of that witness that are compellable under the Jencks Act. The notes were read to the witness and he corrected and confirmed their accuracy. Failure of the trial court to either order their production or to properly preserve them for the record constituted reversible error.

Petitioner's Sixth Amendment rights to compulsory process and effective confrontation were abridged when these notes were not made available to him for purposes of cross-examination. The key government witness was originally a co-defendant in petitioner's case. He entered into a contractual agreement with the prosecutors concerning making a pretrial statement and testifying in accordance with that statement in petitioner's trial. In accordance with this contract, he met with the prosecutors over a period of five days. Notes of those meetings were adopted and approved by the witness. The trial court's refusal to order production of those notes denied petitioner his right to effective cross-examination of the key witness against him. This was constitutional error of the first magnitude and cannot be cured by an attempt to show lack of prejudice.

The trial court's ruling that the notes were protected by the work-product doctrine was erroneous. Historically, the work-product doctrine has been

viewed primarily as a limitation on the ability of a party to obtain pretrial discovery. Materials that are basically evidentiary and impeachment matter are testimonial in nature. A trial court's inherent discretion to rule on evidentiary matters cannot be limited by the work-product doctrine. Also, the prosecutors should have interviewed their key witness in the presence of their case agent as defense counsel are required to do in order to avoid the potential risk of having to testify at trial.

Finally, the trial court erred in the procedure it followed after petitioner made a Brady claim. The court never received assurance from the prosecutor that the notes contained no Brady material and also refused to inspect the notes or preserve them for appellate purposes. Petitioner's case presents a proper vehicle for this Court to establish a uniform procedure for trial courts to follow in resolving Brady issues. Amici respectfully request this Court to adopt the procedure presented herein.

I

THE TRIAL COURT ERRED IN REFUSING TO ORDER PRODUCTION OF THE PROSECUTORS' NOTES UNDER THE JENCKS ACT, AND IN REFUSING TO CONDUCT AN IN CAMERA INSPECTION OF THOSE NOTES.

A. The Prosecutors' Notes of Conversations With the Key Government Witness Constitute Statements Adopted by That Witness Under 18 U.S.C. §3500(e) and are Compellable Under the Jencks Act.

The government's key witness, Edwin S. Newman, was originally a co-defendant with petitioner. Newman's case was severed in order that he could testify for the government against petitioner. Newman entered into a plea agreement with the government that required him to give a complete statement under oath concerning the events which were the subject for prosecution. The agreement also required Newman to testify as a witness for the United States in conformity with the statement that had been given to the United States Attorney under oath before trial. On 11 May Newman participated in a two and one-half hour question and answer session with two attorneys for the government. A reporter was present at that conference and defense counsel was given a transcript of Newman's statements. That transcript revealed that the question and answer session would continue and that there were more items to be explored at a further time. Subsequently, Newman testified

at petitioner's trial. He was the 35th and last witness called by the government. He was the key government witness against the petitioner. At petitioner's trial, defense counsel on cross-examination brought out the fact that Newman had met with the prosecutors for interviews in connection with this trial testimony on at least five different days prior to his testimony on direct examination; that no reporter was present at these meetings and that only Newman and the two prosecutors were present; that during the interviews the prosecutors took notes which they read back to Newman from time to time and Newman would correct them. (R. T. K177-180) Petitioner then moved for production of these notes under 18 U.S.C. §3500, the Jencks Act. The court, without hearing from the government nor inspecting the notes, stated:

> "Aren't these attorney's work products, notes of interviews with witnesses just like yours are? Denied." (R. T. K-181)

On the following day petitioner renewed his demand for the notes under the Jencks Act. Petitioner's demand was again denied and he was instructed to prepare a memorandum. The following Monday petitioner filed with the court a memorandum renewing his demand for production of the prosecutors' notes under both the Jencks Act and Brady v. Maryland, (C. T. 361-364).

Petitioner also requested an in camera inspection of these notes and, after same, a reconsideration by the court of its ruling denying production of the notes. The court again refused petitioner's demand citing the work-product privilege. Consequently, petitioner was denied the opportunity to review these notes. Furthermore, the court never inspected the notes in camera and they were never properly[1] made part of the record in this case.

In Jencks v. United States, 353 U.S. 657 (1957) this Court held that a defendant in a criminal case was entitled to production of government reports that contained statements of government witnesses who testify against him. The only foundation that a defendant need show is that the reports existed and that they concerned the events and activities related in the witnesses' testimony. The defendant was not required to show that an inconsistency existed since he could not do so without inspecting the reports.

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1 / Apparently, at oral argument before the Ninth Circuit Court of Appeals, one of the prosecutors requested and was granted permission to lodge a packet of documents with the court. He described the packet as the notes he could now find. The notes were never produced as part of an adversary hearing. It is well established that this Court will not consider affidavits, assertions, or documents dehors the record. McClellan v. Carland, 217 U.S. 268, 282-283 (1901); Lawn v. United States, 355 U.S. 339, 354 (1957).

As a result of expansive interpretations of the Jencks decision by lower courts, Congress enacted 18 U.S.C §3500, commonly referred to as the Jencks Act. [2] It states in pertinent part:

> (b) After a witness called by the United States has testified on direction examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . .
>
> (e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means. . .
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him:

The first case decided by this Court construing

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2 / The complete text of 18 U.S.C. §3500, commonly referred to as the Jencks Act, is reproduced in Appendix A to this brief.

the Jencks statute was Palermo v. United States, 360 U.S. 343 (1959), in which a defendant was denied production of a 600-word memorandum summarizing parts of a 3 1/2-hour interrogation of the witness by a government agent. This Court held that such a memorandum was not a statement of the kind required to be produced under 18 U.S.C. §3500(e). Justice Frankfurter announced the basic standard for production by noting the importance of whether "the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent." Palermo v. United States, supra at 352. By way of explanation, he went on to state:

> "We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements." Id. at 352, and,
>
> "In expounding this standard we do not wish to create the impression of a 'delusive exactness.' The possible permutations of fact and circumstance are myriad." Id. at 353.

In petitioner's case, the prosecutors' notes were taken over a five-day period and unlike Palermo, the notes were read back to the witness and he would correct them. Such a procedure guarantees that the notes "can fairly be deemed to reflect fully and without distortion what had been said to the prosecutors."

In Campbell v. United States II, 373 U.S. 487

(1963) [3], a government agent took longhand notes which were complete with respect to the pertinent information given by the witness, although not a complete, word-for-word transcription of what the witness had said. Later, the agent prepared a memorandum from the notes and subsequently destroyed the notes. This Court held the memorandum producible under 18 U.S.C. §3500(e)(1), and stated:

> "Plainly, if [the agent] in making the oral representation was in fact reading the notes back to [the witness], the latter's adoption of the oral presentation would constitute adoption of a written statement made by him, namely, the notes. See United States v. Annunziato, 293 F.2d 373, 382 (C.A. 2d Cir. 1961); United States v. Aviles, 197 F.Supp. 536, 556 (S.D.N.Y. 1961)." Id. at 492.

The witness in this case, Newman, had the prosecutors' notes read back to him,and he made

3 / This case was heard by the Supreme Court on two occasions. The first time it was remanded for further factual determinations concerning the "statement." Campbell v. United States, 365 U.S. 85 (1961). That first case will hereinafter be be referred to as Campbell I.

changes. On appeal, the government admitted these notes "were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached." (Brief of the Appellee before the Ninth Circuit Court of Appeals, p. 64) Consequently, the prosecutors' notes constitute a written statement made by Newman and adopted and approved by him. Since they were adopted by the witness, the notes need not be a verbatim recital of Newman's oral statements over the five-day period. [4] Clancy v. United States, 365 U.S. 312, 314-315 (1961).

A number of cases have held that notes of the witnesses' statements taken by prosecutors are compellable under the Jencks Act. United States v. Hilbrich, 341 F.2d 555 (7th Cir. 1965), cert. den., 381 U.S. 941 (1965), reh. den. 382 U.S. 874 (1965), reh. den., 384 U.S. 1028 (1966); United States v. Aviles, 314 F.2d 186 (2d Cir. 1963); Saunders v. United States,

4 / It should be noted that in Palermo the government agent prepared the memorandum and the defendant requested its production when the witness, not the agent,testified. Hence, the proper standard would be 18 U.S.C. §3500(e)(2) which requires the transcription to be a substantially verbatim recital of the oral statement and also to be taken contemporaneously with the oral statement. Had the demand been made for this memorandum after the agent himself testified it would clearly have been producible under 18 U.S.C. §3500(e)(1) as a written statement made by the witness (the agent) and signed by him.

315 F. 2d 346 (D. C. Cir. 1973); United States v. Smaldone, 484 F. 2d 311 (10th Cir. 1973), cert. den., 415 U.S. 915 (1974).

Where, as here, the key government witness, formerly a business attorney for the defendant, had actually signed a contract with the government regarding his testimony, and had met with prosecutors to discuss his testimony for over forty hours, during which time the prosecutors took notes that were read back to and corrected or confirmed by the witness, those notes qualify as compellable statements under the Jencks Act when a proper and timely demand was made by petitioner.

Failure of the trial court to compel production of the prosecutors' notes was prejudicial error which should result in a reversal of petitioner's conviction. Clancy v. United States, supra at 316.

B. The Trial Court Erred in Refusing to Conduct an In Camera Inspection of the Prosecutors' Notes.

There are two distinct areas where a trial court has certain duties regarding demands for production of statements in the possession of the government under the Jencks Act. It is settled that the original burden rests on the defendant to make a proper demand for production. 18 U.S.C. § 3500(b). "The burden rests on the defendant to invoke the statute at the appropriate time." Ogden v. United States, 303 F. 2d 724, 733

(9th Cir. 1962). The petitioner obviously made a proper and timely demand in this case. Once a proper demand is made, the government may claim that the statement in its possession does not "relate to" the subject matter of the witnesses' testimony. The trial court is then under a duty by the terms of the Act itself to conduct an in camera inspection. 18 U.S.C. §3500(c). Should the government claim the documents in its possession do not qualify as "statements" under the Act, the trial court's duty is not explained by the terms of the Act itself. However, this Court in its first decision interpreting the Jencks Act, approved the in camera inspection method of determining whether particular documents qualify as "statements" under the Act:

> "[W]hen it is doubtful whether the production of a particular statement is compelled by the statute,we approve the practice of having the government submit the statement to the trial judge for an in camera determination. Indeed, any other procedure would be destructive of the statutory purpose. . ."
>
> " It is also the function of the trial judge to decide, in light of the circumstances of each case what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. . ."

Palermo v. United States, 360 U.S. 343, 354-355 (1959).

Subsequent to the Palermo case, the procedure of conducting in camera inspections and taking extrinsic evidence has been viewed as an affirmative duty of the trial court. Campbell v. United States I, 365 U.S. 85, 92-96 (1961); Clancy v. United States, 365 U.S. 312, 314-316 (1961); United States v. Chitwood, 457 F.2d 676, 678 (6th Cir. 1972), cert. den. 409 U.S. 852 (1972); Saunders v. United States, 316 F.2d 346, 349 (D.C. Cir. 1963); Ogden v. United States, 303 F.2d 724, 733 (9th Cir. 1962).

Petitioner demanded production of the subject notes on at least three occasions. He also requested the trial court to conduct an in camera inspection. The trial court refused all requests. The government never claimed the notes did not "relate to" Newman's direct testimony, nor did they claim the notes failed to qualify as "statements." The trial court, on its own, ruled the notes must be work product without ever inspecting them. After petitioner's third request, the government broke its silence and alleged the notes were work product. Consequently, the subject notes were never properly made part of the record. Since the trial court failed to perform what many courts have called its "affirmative duty," the harmless error rule of Rosenberg v. United States, 360 U.S. 367 (1959), is inapplicable to petitioner's case.

In Rosenberg, supra, refusal to produce a statement was held harmless error since the information in that statement concerned a small part of the witness'

testimony and it was revealed to defense counsel during questioning by him and by the trial judge. Rosenberg v. United States, supra at 370. In petitioner's case, Newman's testimony, and his five days of conferences with the prosecutors which gave rise to the notes, far exceeded in scope and detail the prior recorded statement that had been turned over to defense counsel. Under these circumstances the trial court's error cannot be considered harmless.

The critical issue in petitioner's trial was the credibility of the key government witness Newman vis-a-vis that of petitioner himself. In a similar situation in Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964), the court refused to invoke the harmless error rule of Rosenberg and stated:

> "The issue is whether counsel should have had the choice of using the statements to test the witnesses' credibility." Id. at 290.

It is extremely difficult for a court of review after reading a cold and emotionless transcript to speculate whether certain statements could have been used effectively during the course of battle in the trial court. That is the type of decision that basically lies with the defendant. This Court recognized that in Clancy v. United States, 365 U.S. 312, 316 (1961), where refusal to compel Jencks Act material was held to be prejudicial error requiring reversal, by stating ". . . it is not for us to speculate whether they could

have been used effectively."

In United States v. Missler, 414 F.2d 1293 (4th Cir. 1969) cert. den. 397 U.S. 913 (1970), the court framed the issue as follows:

> "The requirements of the Jencks Act are intended to provide defendants in federal prosecutions with an opportunity for thorough cross-examination of government witnesses, making the constitutionally guaranteed right of confrontation more meaningful. Violations of the statute are necessarily attended by the danger that this precious right will be impaired. For this reason, and also because it is ordinarily difficult upon review of a cold record to ascertain the value to the defense of a statement withheld, violation of the Act is excused only in extraordinary circumstances. [citations omitted] Unless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated." Id. at 1303, 1304.

Due to the unique circumstances in the present case surrounding the key government witness -- his status as a co-defendant and prior business associate, his unique deal with the government, the extent of his testimony at trial, the narrow extent of pretrial discovery of his statements, and the particular importance of his credibility -- petitioner's remedy is a reversal of his conviction and the granting of a new trial.

II

PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT WERE ABRIDGED BY THE TRIAL COURT'S FAILURE TO COMPEL PRODUCTION OF THE PROSECUTOR'S NOTES

Of primary importance in this case is the issue of whether refusal to produce the notes so effected petitioner's Sixth Amendment rights to confrontation and compulsory process that he was denied his due process right to a fair trial under the Fifth Amendment. These issues are closely interrelated but must be decided in resolving petitioner's case. Should this Court hold the notes are Jencks Act statements, these issues will be resolved in the context of prejudicial versus harmless error. (See argument IB) If the notes are held not to be statements as the Court of Appeals held, the question remains whether the Fifth and Sixth Amendments compel production outside the realm of the Jencks Act.

This Court has recognized that just below the surface of Jencks Act questions lurk serious Fifth and Sixth Amendment issues, Palermo v. United States, 360 U.S. 343, 362 (1959) (J. Brennan, concurring); United States v. Augenblick, 393 U.S. 348, 356 (1969); as have circuit courts, United States v. Missler, 414 F.2d 1293, 1303, 1304 (4th Cir. 1969), cert. den. 397 U.S. 913 (1970); United States v. Cleveland, 477 F.2d 310 (7th Cir. 1973); United States v. Aaron, 457 F.2d 865 (2d Cir. 1972).

"There is an obvious constitutional problem in an interpretation that the [Jencks] statute restrains the trial judge from ordering such a statement produced. Less substantial restrictions than this of the common-law rights of confrontation of one's accusers have been struck down by this Court under the Sixth Amendment, see Kirby v. United States, 174 U.S. 47. And in such circumstances, there becomes pertinent the command of that amendment that criminal defendants have compulsory process to obtain witnesses for their defense. See United States v. Schneiderman, 106 F.Supp. 731, 738." Palermo v. United States, supra at 362. (J. Brennan concurring).

Although the majority opinion in Palermo v. United States, supra at 351, viewed the Jencks Act as the exclusive device for production of government documents, this Court apparently adopted Justice Brennan's view when it held evidence favorable to the accused must be revealed to him on due process grounds. Brady v. Maryland, 373 U.S. 83, 87 (1963). (See argument IV, infra). Also, when the issue of compelling production of secret grand jury testimony of government witnesses was raised in Dennis v. United States, 384 U.S. 855 (1965), it was held that defendants

had a right to that testimony for purposes of cross-examination even though they were not expressly compellable under the Jencks Act.

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." Dennis v. United States, supra at 870.

The Jencks Act was amended subsequent to Dennis to expressly include grand jury testimony of government witnesses. 18 U.S.C.§3500(e)(3).

It seems apparent then, that based on Fifth and Sixth Amendment considerations "it is not inconsistent with achievement of the statute's [18 U.S.C. §3500] aim to require the production of statements outside the scope of the statute where the fair administration of justice so demands." Palermo v. United States, supra at 363 (J. Brennan concurring).

Petitioner was denied the opportunity to inspect the subject notes prior to cross-examination of the government's key witness. The trial court's discretionary power to compel production of those notes should have been exercised in light of the compulsory process clause of the Sixth Amendment. See United States v. Schneiderman, 106 F.Supp. 731, 735 (S.D.Cal. 1952); cited with approval in Jencks v. United States, 353 U.S. 657, 688 n.13 (1957).

In accord, United States v. Augenblick, 393 U.S. 348 (1969); Washington v. Texas, 388 U.S. 14, 17-19 (1967). By refusing to inspect the notes in camera and failing to order production of the notes to perfect the record, the trial court abridged petitioner's Sixth Amendment right to compulsory process.

Furthermore, since Newman was the key government witness and his testimony in many respects was in direct contrast to petitioner's testimony, a denial of effective cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3 (1966), cited with approval in United States v. Illinois, 390 U.S. 129, 131 (1968), and Davis v. Alaska, 415 U.S. 308, 318 (1974).

This Court has historically placed great emphasis on the right of those accused of crime to confront the witnesses against them. Kirby v. United States, 147 U.S. 47, 55-56 (1899); Alford v. United States, 282 U.S. 687, 692 (1931); In re Oliver, 333 U.S. 257, 273 (1948); Pointer v. Texas, 381 U.S. 400, 405 (1965); Smith v. Illinois 390 U.S. 129, 131-132 (1968); Barber v. Page, 391 U.S. 719, 725 (1968); Davis v. Alaska, 415 U.S. 308, 315, 316 (1974).

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no

> one, certainly no one experienced in the trial of law suits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."
> Pointer v. Texas, supra at 404. See also Douglas v. Alabama, 380 U.S. 415, 418 (1965).

The conduct of the trial court has rendered it useless to speculate as to the contents of the subject notes, how petitioner could have used the notes on cross-examination of Newman, or how the jury would have been effected by disclosure of the notes. In Alford v. United States, supra, and Smith v. Illinois, supra, however, criminal convictions were reversed because defense counsel was prevented from merely inquiring into the true name and address of the key witnesses, and this Court stated these questions could open potential avenues of bias and were the starting point in exposing falsehood and bringing out the truth. It is also rather coincidental to note that in Alford the defendant had been convicted of using the mails to defraud, the key government witness was a former employee of the defendant, and that witness testified to uncorroborated conversations of the defendant of a damaging nature. Thus the facts of petitioner's case are remarkably similar to Alford. In his frequently quoted opinion Justice Stone stated:

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . ." Alford v. United States, supra, 282 U.S. at 692.

Alford was quoted extensively in the very recent case of Davis v. Alaska, 415 U.S. 308 (1974), where a defendant was precluded from questioning a key government witness concerning his status as a juvenile probationer because of a state's policy of protecting juvenile records. Defense counsel wishes to develop a theory of possible bias so inferences could be made of undue pressure because of the witness' status as a probationer. This Court held that the defendant

was "denied the right of effective cross-examination" Id. at 318, and the "State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Id. at 320.

In the present case the witness Newman was vulnerable to undue pressure because of the outstanding indictment, and petitioner was precluded from pursuing the extent of Newman's cooperation with the government due to lack of access to the notes. This right has been called "[o]ne of the fundamental guarantees of life and liberty," Kirby v. United States, supra at 55; "one of the safeguards essential to a fair trial," Alford v. United States, supra at 692; and "as indispensable an ingredient as the right to be tried in a courtroom presided over by a judge." Pointer v. Texas, supra at 410.

> "There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, supra at 405.

When notes exist of five days of lengthy conversations with the key government witness and petitioner has

had only partial pretrial discovery of that witness' statements, petitioner's right to effective cross-examination has been denied by the trial court's refusal to compel production of those notes. As in Alford v. United States, supra; Smith v. Illinois, supra; and Davis v. Alaska, supra, this Court should refuse to speculate as to the effect production would have had at trial and simply reverse petitioner's conviction.

III

THE TRIAL COURT'S REFUSAL TO COMPEL PRODUCTION OF EVIDENTIARY AND IMPEACHMENT MATERIAL BASED ON THE WORK PRODUCT DOCTRINE CONSTITUTED A DENIAL OF PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL

A. The Work Product Doctrine does not Limit a Judge's Broad Discretion to Compel Production of Evidentiary and Impeachment Matter at Trial.

The trial court denied petitioner's demand for production of the prosecutors' notes in this case stating that those notes were protected under the work product doctrine. This ruling was made without the benefit of even reviewing the prosecutors' notes in camera. It is clear from reading 18 U.S.C. § 3500, the Jencks Act, that there is no explicit work-product exception in the Act itself. Petitioner knows of no decision of law establishing a work-product exception to the Jencks Act. On the contrary, a number of cases have held that a work-product exception does not exist as to the Jencks Act. In Saunders v. United States, 316 F. 2d 346, 350 (D.C. Cir. 1963), the court held that if notes fell within the provisions of the Jenoks Act there would be no invasion of the attorney's work product no matter when the interview was conducted. Id., at 350. In United States v. Hilbrich, 232 F. Supp. 111 (N. D. Ill. 1964), the court stated that an appellate court would not uphold a work product claim interposed in an attempt to deny a

criminal defendant that which he would otherwise be entitled. The trial court did, however, rule that certain notes of government counsel were work product and need not be delivered. On appeal, the Seventh Circuit held that:

> "The district court erred at the trial by stating in response to defendant's broad motion to produce that 'handwriting or notes' of government counsel were part of their 'work product' and need not be delivered. There is no 'work product' exception to the Jencks Act." United States v. Hilbrich, 341 F. 2d 555, 557 (7th Cir. 1965), cert. den., 381 U.S. 941 (1965); reh. den. 382 U.S. 874 (1965); reh. den. 384 U.S. 1028 (1966).

Both Saunders and Hilbrich concerned notes that were taken by government attorneys during the course of interviews with witnesses who subsequently testified for the government.

The question remains whether the prosecutors' notes in this case are protected from production under the general provisions of the work-product doctrine as enunciated by this Court in Hickman v. Taylor, 329 U.S. 495 (1947). The basic purpose of the work-product doctrine is to protect the mental processes of an attorney, thereby giving him a zone of safety in which he can analyze, prepare, and plan

stratgey concerning his client's case. When first establishing the work-product doctrine, this Court stated:

> "Historically, a lawyer is an officer of the Court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible

and intangible ways - aptly and roughly termed by the circuit court of appeals in this case [153 F. 2d 212, 223] as the 'Work product of the lawyer'. Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Hickman v. Taylor, 329 U.S. 495, 510-511 (1947).

The work product doctrine is not absolute. In United States v. Nobles, __ U. S. __, 95 S.Ct. 2160 (1975), defense counsel sought to impeach the credibility of key prosecution witnesses by testimony of a defense investigator regarding statements previously obtained from the witnesses by the investigator. This Court held that a trial court may compel the defense, as a condition precedent to the investigator's testifying, to reveal the relevant portions of the investigator's report for the prosecution's use in cross-examining him. In that case, the investigator's

report fell within the broad definition of the work-product doctrine as enunciated in Hickman v. Taylor, supra. The majority opinion in Nobles stated that the work-product privilege was waived with respect to matters covered by the defense investigator's testimony. United States v. Nobles, __ U. S. __, 95 S.Ct. 2160, 2170-2171 (1975). This Court intimated, however, that the scope of the work product doctrine at trial may be limited, but refused in the Nobles case to undertake to deliniate the scope of the work-product doctrine at a trial.

Historically the work-product doctrine has been viewed primarily as a limitation on the ability of a party to obtain pretrial discovery. In Hickman v. Tyalor, supra, the respondent admitted that he was requesting the subject materials simply to help him to prepare his case. This Court properly recognized that certain materials that could be considered work product as well as evidentiary or impeachment materials are subject to pretrial discovery because of their testimonial nature. Hickman v. Taylor, supra at 511. Therefore, the work-product doctrine cannot prevent production of materials at trial that are of a testimonial or impeachment nature. A trial court's broad discretion over evidentiary matters cannot be limited by the work-product doctrine.

In United States v. Nobles, supra, it was stated that:

"The Sixth Amendment does not confer

the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half truth." United States v. Nobles, supra at 2171.

Surely then, the work product doctrine , or for that matter the Jencks Act itself, cannot confer the right to present testimony free from the legitimate demands of the adversarial system. One cannot and should not be permitted to invoke the work-product doctrine or the Jencks Act as a justification for presenting what might have been a half truth. Compelling production of the prosecutors' notes in this case would have simply aided the fact finding process. If the notes were consistent with the witness' testimony they would have been entirely harmless. If the notes were in fact inconsistent with the witness' testimony they would have been of unquestioned value to the jury and would have enhanced the search for truth. Petitioner in this case was merely demanding to view notes of statements made by the key government witness. This was not an attempt to rummage through the files of the prosecutor nor to gain information concerning his opponent's strategy or mental impressions of the case. Petitioner was seeking to discover if prior inconsistent statements had been made, and if so, to use those statements to impeach a key witness. Under these circumstances, the

petitioner's Sixth Amendment right to confrontation of the main witness against him was abridged by the failure of the trial court to even view these notes in camera to establish whether they were compellable under any of the available theories of law raised by petitioner. As this Court observed in United States v. Nixon, 418 U.S. 683 (1974):

> "We have elected to employ an adversarial system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be found on a partial and speculative presentation of facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of courts that compulsory processes be available for the production of evidence needed either by the prosecution or by the defense." Id. at 709.

In Nixon this Court ordered pretrial disclosure

of presidential tapes, thus overriding a claim of executive privilege. While recognizing that the privilege was "constitutionally based" (Id. at 711), this Court nevertheless ordered disclosure because:

> ". . . the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." Id. at 712.

The importance of the production of evidence had been previously stated by this Court in Jencks v. United States, 353 U.S. 657 (1957). The purpose of disclosure is to enhance the truth finding process. Hence, the work-product doctrine can impose no restrictions on the trial judge ordering production of evidentiary and impeachment matters at trial. See United States v. Nobles, __ U.S. __, 95 S.Ct. 2160, at 2176 (J. White concurring).

B. The Jury's Interest in Obtaining all Relevant Information Outweighs the Public Policy Against Putting in Issue the Credibility of the Prosecutor, Where that Issue Could Have Easily Been Avoided by the Prosecutor Himself.

Justice White in his concurring opinion in United States v. Nobles, __ U.S. __ (1975), 95 S.Ct. 2160, 2176 (1975), stated that the work-product doctrine would not be applicable at trial with respect to matters

that were evidentiary or impeachment materials. Justice White, however, would make an exception to that rule with respect to the production and use of oral statements written down by the lawyer since that would create a substantial risk that the lawyer would have to testify. It is true that courts have frowned on any practice under which an attorney who tries a case also testifies as a witness. Yet, in the present case it was the conduct of the prosecutors themselves that created the potential risk of their having to testify. The key government witness in this case was interviewed by the government prosecutors alone. There was no case agent or investigator present during those interviews. The potential risk of the prosecutors in this case having to eventually take the stand and testify could have easily been avoided by conducting the interview of the key witness in the presence of a third person. To require government attorneys to do this would be to place upon them no greater burden than has been placed on defense attorneys for quite some time.

> "Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyers own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present his impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the

presence of a third person." A.B.A. Project On Standards for Criminal Justice, Standards Relating to the Defense Function, § 4.3(d), p. 161 (Approved Draft 1971).

In the present case the jury's interest in obtaining all relevant information far outweighs the policy against putting in issue the credibility of the prosecuting attorneys where those attorneys themselves could have easily avoided the situation by interviewing the key witness in the presence of a third person such as their case agent. To require government attorneys to interview witnesses in the presence of third persons would merely be imposing a reciprocal burden upon them. In the present case the prosecuting attorneys knew that Mr. Newman would be a key government witness in a jury trial that was expected to begin within a couple of days. In fact the purpose of the interview with Mr. Newman was to get a full and complete statement from him in preparation for that trial. The first portion of his statement had been taken in the presence of third parties and had been recorded. At that time it was understood by all that more interviews would follow. These interviews were not preliminary investigation in order to establish a case or to decide whether or not to take a case to the grand jury. There was no doubt that Mr. Newman would be testifying momentarily. Under these circumstances it is reasonable to require prosecuting attorneys to interview witnesses in the

presence of a third person. Not to do so would encourage prosecutors to assume the role of their investigators. It would also create the substantial danger that inconsistent statements by accomplices and cooperators would never be disclosed, thereby seriously hampering the search for truth in criminal prosecutions.

IV

THE TRIAL COURT ERRED IN REFUSING TO COMPEL PRODUCTION OF THE PROSECUTORS' NOTES UNDER THE DOCTRINE OF BRADY V. MARYLAND

The statements of Newman to the prosecutors should be held compellable under Brady v. Maryland, 373 U.S. 83 (1963), and the refusal of the trial court to order their production for the record, an abuse of discretion. In Brady this Court held that reversal should follow failure to disclose certain materials, not on a theory of punishing society for the misdeeds of a prosecutor, but rather to insure the defendant's due process rights. The much-quoted heart of the opinion states:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor. Brady v. Maryland, supra at 87. See also Giles v. Maryland, 386 U.S. 66 (1967), and Giglio v. United States, 405 U.S. 150 (1972).

To insure a fair trial, a decision or verdict should be based on all the available evidence, much of which, "because of imbalance in investigative resources, will be exclusively in the hands of the government." United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971). In Dennis v. United States, 384 U.S. 855, 873

(1965), this Court stated that "in our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." In reversing for the trial court's failure to compel disclosure of the grand jury testimony of key government witnesses, notice was taken of the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." Id. at 870.

Petitioner made a specific request for materials that were exclusively in the hands of the government. It cannot be argued that Newman, with an outstanding indictment against him, would have cooperated with petitioner or his counsel. Consequently, by suppressing the notes the prosecution guaranteed itself exclusive access to this storehouse of relevant fact.

In Moore v. Illinois, 408 U.S. 786 (1972), the following criteria were established by this Court to determine just what material ought to be disclosed under Brady:

> ". . .(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." Id. at 794-795.

Petitioner made at least three timely requests for production of the notes and they were suppressed by the prosecution and the trial court.

Various standards have been enunciated as to the

degree to which evidence must be favorable to the accused for its nondisclosure to warrant reversal. See, e.g., United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) (might have led the jury to entertain a reasonable doubt); United States v. Brawer, 367 F. Supp. 156 (S. D. N. Y. 1973)(a substantial probability that the result would have been altered); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) (if the evidence was in fact favorable).

Similarly, with respect to materiality courts have differed on whether failure to disclose impeachment material should warrant reversal. See, e.g., Dennis v. United States, supra; Napue v. Illinois, 360 U.S. 264 (1959); and cases cited in argument II, supra. Cf. Klein v. Smith, 383 F.Supp. 485 (D.C.N.Y. 1974); Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966).

The conduct of the trial court has effectively precluded petitioner from arguing the favorability and materiality of the contents of the disputed notes. He has never seen them and cannot argue in a vacuum.5 /

5 / It should be noted that commentators have argued that favorability, as the term has come to be used, is a misleading standard for Brady disclosure. In making the standard whether disclosure would have changed the outcome of the trial, courts have diverged from the spirit of Brady. A more appropriate standard would be that disclosure of most material should be required whenever the evidence would be useful to the defense in preparing or presenting its case. Comment, Brady v. Maryland and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112 (1972). Arguments have also been presented for an open file policy. Note, Implementing Brady v. Maryland: An Argument for a Pretrial Open File Policy, 43 U. Cinn. L. Rev. 889 (1974).

That the conduct of the trial court represents an abuse of discretion is confirmed by two salient factors which set petitioner's case apart from most others on which a Brady appeal is taken. First, the prosecutor never represented to the trial court that the subject notes contained no Brady material. Second, no in camera inspection of the disputed materials was conducted, and the notes were never sealed and made part of the record for appellate purposes. Thus, there was no assurance at the trial level that the disputed notes lacked material favorable to the defense. Such procedures cannot be countenanced by this Court.

Clearly, courts have the discretionary power to conduct in camera examinations when Brady claims are made. See, e.g., United States v. De Sena, 490 F.2d 692 (2d Cir 1972); United States v. Davis, 487 F.2d 112 (5th Cir. 1973); Pollard v. United States, 441 F.2d 566 (7th Cir. 1971). On the other hand, appellate courts have upheld trial courts refusing to conduct such examinations, see, e.g., Frazier v. United States, 394 F.2d 258 (4th Cir. 1968), because of a reluctance to "rummage through the prosecutors' files on behalf of the defendant." Id. at 262.

In petitioner's case, a specific request for known materials was made, no in camera inspection nor sealing of the record occurred, and no assurances were made by the prosecutor that there was no Brady material. It is submitted that this case presents a proper vehicle for this Court to establish uniform procedures for the handling

of Brady allegations at the trial court level and amici respectfully suggests the following:

First, a demand by the defense for the production of Brady evidence. Second, the disclosure by the prosecution of the exculpatory evidence or denial that such evidence exists. Third, if the defendant is not satisfied with the production or denial of existence, the trial court should undertake an in camera examination of specifically identified material designated by the defense. Such material should be made part of the sealed records of the court for appellate review.

This procedure while involving some expenditure of judicial time at the trial level has substantial merit. It avoids the wholesale rummaging through the prosecution file disapproved of in United States v. Frazier, supra. It avoids reliance on unbridled prosecutorial discretion as to what is favorable. It facilitates appellate review by requiring the defense to specify documents and make them part of the record. It provides a second opinion at the trial stage by an impartial arbiter as opposed to an advocate, so that the incidents of reversible error are reduced and the policy of judicial economy is enhanced. Cf. Comment, Brady v. Maryland and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 120-135 (1972). Similar procedures have received the imprimatur of both Congress and this Court in the area of resolving Jencks Act disputes.

The trial court adopted the worst possible procedure to resolve petitioner's Brady request. It failed to ask for any assurance from the prosecutor, to conduct its own

inspection, or to properly preserve the record for appellate review. Under these circumstances petitioner's conviction should be reversed.

CONCLUSION

For the foregoing reasons, as well as those contained in petitioner's brief, amici respectfully submit that this Court reverse the decision of the Court of Appeals.

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APPENDIX

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18 U.S.C. § 3500

Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relates to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of

the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subjection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means ---

(1) a written statement made by said witness and signed or otherwise adopted or approved by him:

(2) a stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

As amended Pub.L. 91-451, Title 1, §102, Oct. 15, 1970, 84 Stat. 926.